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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1958

No. 305

GEORGE HUSS, RUSSELL HUSS AND WESLEY HUSS, PETITIONERS,

vs.

FRANCIS R. SMITH, FORMER COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF PENNSYLVANIA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 25, 1958
CERTIORARI GRANTED OCTOBER 13, 1958

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[fol. 1]

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Appellants' Appendix

RELEVANT DOCKET ENTRIES

Feb. 4, 1953.	Complaint filed.
Feb. 4, 1953.	Summons exit.
Mar. 5, 1953.	Summons returned "on February 5, 1953 served Francis R. Smith and United States Attorney and on February 10, 1953 served Attorney General and Commissioner of Internal Revenue by registered mail" and filed.
Aug. 20, 1956.	Stipulation of Facts filed.
Apr. 6, 1957.	Stipulation extending time for filing answer, etc. to 6/4/53 and Order approving same filed. 4/7/53 noted (Grim)
Oct. 2, 1957.	Answer filed.
Nov. 25, 1957.	Trial—Witnesses sworn (cont. to 12/22/55).
Dec. 7, 1957.	Transcript of Testimony filed.
Jan. 11, 1957.	Motion and notice of, for leave to file amended complaint filed.
Feb. 7, 1957.	Plaintiff's requests for findings of fact and conclusions of law filed with the Court on 1/10/57,
Feb. 11, 1957.	Defendant's objection to Plaintiff's motion for leave to amend the Complaint filed.
Mar. 26, 1957.	Opinion Van Dusen, J. sur pleadings and proof with findings of fact and conclusions of law, filed.

Mar. 26, 1957. Order of Court denying motion for leave to amend, filed. (noted and notice mailed 3/27/57).

[fol. 2]

Apr. 25, 1957. Stipulation and Order of Court suspending Order of Court filed 1/11/57 until final judgment is entered in accordance with Opinion of Court dated 3/26/57 filed. (noted and notice mailed 4/26/57).

May 28, 1957. *14775*—Judgment in favor of Defendant against Plaintiff on years 1944 and 1945, and in favor of Plaintiff against Defendant on year 1946 in $625.77 plus interest from 3/15/47 and for year 1947 in $1134.66 plus interest from 3/2/48, each party to bear own costs, and issuing certificate of probable cause, filed. (5/31/57 noted and notice mailed).

May 28, 1957. *14776*—Judgment in favor of Defendant against Plaintiff for years 1944 and 1945, and in favor of Plaintiff against Defendant for years 1946 in $624.93 plus interest from 3/15/47 and 1947 in $1134.67 plus interest from 3/2/48, each party to bear own costs, and issuing certificate of probable cause, filed. (5/31/57 noted and notice mailed).

May 28, 1957. *14777*—Judgment in favor of Defendant against Plaintiff for years 1944 and 1945, and in favor of Plaintiff against Defendant for year 1946 in $625.78 plus interest from 3/15/47 and for year 1947 in $1134.67 plus interest from 3/2/48, each party to bear own costs, and issuing certificate of probable cause, filed. (5/31/57 noted and notice mailed).

[fol. 3]

Excerpts From Testimony

Russell Huss, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Berger:

Q. Where do you live, Mr. Huss?
A. Ringtown, Pennsylvania.
Q. What county is that?
A. Schuylkill County.
Q. Now, during the years 1944 to 1947, inclusive, what was your occupation?
A. Strip mining.
Q. What is your present occupation?
A. Strip mining.
Q. Did you engage in the strip mining operation in Schuylkill County during the years 1944 to 1947 with your brothers?
A. I did.
Q. Their names are George Huss and Wesley Huss; is that right?
A. That's correct.
Q. You and your two brothers had a partnership?
A. We did.
Q. You had a partnership.
It is because of the strip mining operations which were carried on by you and your two brothers as a partnership that these three lawsuits are brought; isn't that correct?
A. That is correct.
Q. Now, were there two companies with whom, during the period here in question, you and your brothers as partners did business?
A. Yes.
Q. As strip miners.
What were the two companies?

[fol. 4] A. Philadelphia and Reading Coal and Iron Company and Stevens Coal Company.

Q. Now, during the years from 1944 to 1947, inclusive, in what areas were you and your brothers strip mining?

A. We were stripping in the Good Springs area known as the Tower City Tract.

Q. What county in Pennsylvania?

A. That would be Schuylkill County.

Q. Since 1947, by the way, did you continue to do strip mining for the Philadelphia and Reading Coal and Iron?

A. Yes.

Q. Until when?

A. Until 1953.

Q. I see. All right.

Will you tell me——

Mr. Berger: May I have this marked for identification?

(A document purporting to be contract between the Philadelphia and Reading Coal and Iron Company and George W. Huss Contracting Company, identified as Stripping No. P-22, was marked as Exhibit P-1 for identification.)

By Mr. Berger:

Q. You entered into certain written contracts with the Philadelphia and Reading Coal and Iron Company, did you?

A. That is correct.

Q. I will now show you Plaintiff's Exhibit No. 1 for identification and ask you whether or not this contract was the first of the contracts which you had entered into—that is, you and your brothers—with the Philadelphia and Reading Coal and Iron Company with reference to the stripping operations beginning in 1944?

A. That is the first contract.

[fol. 5] The Court: Have you given that to the stenographer to mark, Mr. Berger?

Mr. Berger: Yes, Your Honor. It has been marked as P-1.

The Court: All right.

Mr. Berger: Your Honor, so that we won't get too confused here, let me say that the Coal Company has designated this as P-22.

Off the record.
The Court: Yes.

(Discussion off the record.)

The Court: What is the date of the contract?
Mr. Berger: Let me see. The date of the contract is——
The Court: May 27, 1944?

* * * * * * *

Mr. Fink: Your Honor, in all candor, I believe that with this case, with the developing state of the law which Your Honor may be instructed on from the Third Circuit, since we are letting one contract stand for about nine, I believe it would be most advisable, Your Honor, to have the one contract in its entirety go in.

It is almost impossible to say what the Third Circuit might pick up as a relevant feature of this contract that we at this time would not regard as such.

The Court: Still I would like to have Mr. Berger designate which articles he considers are pertinent, and in due course I would like to hear from you in writing, in a letter which I will attach to the record, which articles you think are pertinent.

Mr. Berger: Off the record——
The Court: Yes.

[fol. 6] (Discussion off the record.)

Mr. Berger: I should say Articles 1, 2, 5, 7, 9, 10, 11, 16, 17, 19, 22, 29, 37, and 39.

* * * * * * *

By Mr. Berger:

Q. How deep do you go in your strip mining operation in fact, not in reference to this map, but in fact how deep do you cut?

A. Why, our cuts will run as deep as 145 feet.

Q. In other words, beginning at the surface, in some instances you went as deep as 145 feet?

A. Yes.

* * * * * * *

By Mr. Berger:

Q. In other words, what is your testimony with respect to the manner in which you got compensated? You got paid per ton of coal; is that correct?

A. That is correct.

Q. And you had no other basis for compensation whatever?

A. None whatever.

Q. In Exhibit P-1, the original price per ton of coal which you received is stipulated at $1.75; is that correct?

A. That is correct.

Q. Were there supplementary agreements which increased that price?

A. Yes, there were.

* * * * * * *

Mr. Berger: Now it is agreed that the price which previously was $1.75 per ton under the agreement marked P-1 in this record was subsequently increased to $1.85 per ton and then increased to $2.00 per ton. That is correct, isn't it?

Mr. Fink: That's correct.

[fol. 7] By Mr. Berger:

Q. Tell His Honor what brought about the increase.

A. Well, there is a stipulation there in the contract that says if there is an increase in labor, there will be an increase in the price of coal. Now, if the labor increase came along, the price of coal was raised up allowing the coal companies to allow more money.

By the Court:

Q. That is your labor, is it?

A. That is my labor.

Q. Your labor costs. If your labor costs increased, under the terms of the original contract you were to be allowed a larger price per ton; is that correct?

A. That is correct, Your Honor.

Q. So that the first supplemental agreement was just carrying out that provision in the original contract?

A. That is correct.

Q. You say that is because of your increased labor costs. Subsequently, there was a second supplemental agreement which increased it further because of a further increase in your labor costs?

A. That is correct.

The Court: Could we have the dates of those two supplemental agreements?

Mr. Berger: Yes, Your Honor.

The first supplemental agreement was the 20th of August 1945.

The second supplemental agreement was the 28th of October 1946.

* * * * * * *

By Mr. Berger:

Q. Mr. Huss, how long have you been in the coal business?

A. Since 1937.

[fol. 8] Q. And are you now and were you in 1945 and thereafter, familiar with the market conditions in the coal industry, the hard coal industry?

A. Yes.

Q. And are you familiar with the bargaining between the United Mine Workers and various operators like yourself?

A. Yes, I am.

Q. Is it a fact that the United Mine Workers demanded more money from you?

A. Yes.

Q. What effect did the increase in wage payments and wage scales have, to your personal knowledge, on the price of coal on the open market?

A. Well, the price always rose.

By the Court:

Q. Always rose when?

A. After the new United Mine Workers' agreement.

Q. Suppose the United Mine Workers' agreement de-

creased the price to be paid to the members of the Union, then it wouldn't rise, would it?

A. There is a provision in the contract; or there was, that allowed for that, but during those years it never happened. It has not happened since.

Q. In other words, it was contingent on the cost-of-living index, was it?

A. I would say yes.

Q. The cost of living was constantly going up so that the cost the miners got was going up; is that correct?

A. That is correct.

Q. Whenever there was an increase, there would be an increase in the price of coal within the next six months, or how soon after that?

A. Sometimes within the next three months, depending—during those years there was a lot of times when the coal companies had to go to the Government to be allowed [fol. 9] an increase in the sale price of the coal, and sometimes that would take as much as six months, but they would finally get it.

The Court: Mr. Fink, did you have anything you wanted to say? If you want to make a motion to strike, you feel perfectly free to make any motion you wish. I will be happy to listen.

Mr. Fink: It is a confusing way to go at some thing. He has shown no connection between——

The Court: He has not asked the question yet relating to this. He is establishing this witness' knowledge of the general pattern of the price of coal, as affected by the amount paid to the miners.

Mr. Fink: I will accept the witness' statement, subject to cross-examination.

By Mr. Berger:

Q. Are you prepared to testify what happened when the United Mine Workers demanded an increase and the market did not permit an increase in the sale price of the coal?

A. Well, in these years that has never happened.

Q. Has it happened since those years?

A. There hasn't been an increase in recent years but the market price of the coal has been reduced to some extent.

Q. What effect did the reduction in the market price of the coal have on your operations with the Philadelphia and Reading Coal and Iron?

A. At the present, today, we have no operations for the Philadelphia and Reading Coal and Iron.

Q. Now, getting back to the equipment you had on this operation, were there any buildings that were constructed?

A. Yes, we had to construct buildings, shops, supply houses.

[fol. 10] Q. Now, was there any back-filling required to be done under these contracts?

A. Not in those years, there was not.

Q. All right.

How long did you continue to strip mine under these various contracts?

A. Until it wasn't any longer profitable to strip.

Q. When you reached that point, what happened?

A. We stopped.

Q. Now, it has been pointed out that there is a cancellation clause in this agreement. Are you familiar with that cancellation clause?

A. Yes, I am.

Q. Now, did you have any discussions with any representative of the Philadelphia and Reading Coal and Iron with reference to that cancellation clause at the time you were negotiating the contract, the first contract?

A. Yes, I did.

(sic) Tell His Honor what those discussions were.

Mr. Fink: I am going to object if it is an effort to vary the terms of this written instrument.

* * * * * * *

Will you proceed, Mr. Berger?

By Mr. Berger:

Q. Mr. Huss, with reference to the cancellation clause, did you have any discussion or discussions with representa-

tives of the Philadelphia and Reading Coal and Iron Company?

A. Yes, I did, because when I saw that cancellation clause in there, I was concerned about it.

Q. Who were the representatives?

A. Charlie Brown and Bill Mulhoff of the Engineering Department. I talked to them.

Q. Is Mr. Brown in court today?

A. Yes, he is.

[fol. 11] Q. What was stated in this conversation?

A. Well, the first thing I wanted to know is if I moved in on the property and started to work, I may spend ten, twenty, thirty thousand dollars moving in, if they could cancel out at any time with a 30-day notice.

He told me that provision was put in there in a form contract so as if they got hold of a contractor who was not reputable, who wouldn't live up to the contract, they could put him off the property without court action.

By the Court:

Q. Now, when was this conversation?

A. Before I signed the contract.

Q. Before May of 1944?

A. Your Honor, I think that contract was made in May. I don't know whether it was signed exactly on that day. I think it was sometime later.

Q. It is dated May 27, 1944.

When do you think it was signed?

A. Possibly a week or two after that.

Q. You think it was during that week or two that you had this conversation with Mr. Brown and Mr. Mulhoff?

A. That is correct.

Q. Where was the conversation?

A. At the offices of the Philadelphia and Reading Coal and Iron Company in Pottsville.

Q. In Pottsville.

Was there anyone present at the conversation except you and Mr. Brown and Mr. Mulhoff?

A. There could have been some other men there. I wouldn't recall just who they were.

Q. Was there anybody with you as far as you remember?
A. My brother, George.
Q. Your brother, George?
A. That is correct.
Q. Was there any further discussion on this matter [fol. 12] prior to the signing of subsequent contracts or was this the only time it was discussed?
A. That was the only time it was discussed.

By Mr. Berger:

Q. Now, did you thereafter move your equipment on and build the roads?
A. Yes.
Q. Was this contract or any subsequent contract ever cancelled out by the Philadelphia and Reading Coal and Iron alone?
A. No.
Q. Did you perform your obligations under the contract?
A. I did.
Q. Was this contract, which is in the record as P-1, after the completion of this strip mining, cancelled by mutual agreement?
A. Yes.
Q. When?
A. Well, there are so many of them I would have to look at the dates of them.

Mr. Berger: I am showing the witness, Your Honor——
The Witness: The 31st——
The Court: Let Mr. Fink see the document you are showing him.
The Witness: The 31st day of October 1947.
Mr. Berger: May I state for the record, Your Honor, this Cancellation of Agreement is physically attached to P-1.
The Court: That will go in the record, together with the other relevant portions of P-1?
Mr. Berger: Yes, Your Honor.

[fol. 13] By Mr. Berger:

Q. Mr. Huss, who determined when and where to begin the mining in a particular area?

A. In those areas I did.

Q. Who determined when and where to stop the mining?

A. I did.

Q. Who paid the men who did the work in this operation?

A. I did.

Q. Who paid for all of the supplies and materials?

A. I did.

Q. Who paid for the equipment?

A. I did.

Q. Now, did there come a time in your relationships with the Philadelphia and Reading Coal and Iron where, after strip mining, you uncovered coal and delivered the same to the Philadelphia and Reading Coal and Iron, and they rejected it?

A. Yes, there was, in later years.

Q. Tell His Honor briefly what the situation was. First of all, was it under a similar contract?

A. It was under a similar contract, and the coal was of such a quality that they said they couldn't use it at their plant, and at that time I made an agreement with another colliery to take the coal, subsequent to the Reading's agreement that it would be all right to sell it, and the Reading paid me the money under the agreement that I had with the coal company. They collected off the coal company and paid me my share of the money at that particular time.

* * * * * * *

By Mr. Berger:

Q. What was retained by the Philadelphia and Reading Coal and Iron? Was so much per ton retained?

A. I don't know what the agreement was, but whatever the royalty was at that time was what they kept out of it.

[fol. 14] Q. The rest was remitted out to you?

A. That is correct.

By the Court:

Q. Who is "they"? Who is keeping this? Did the Philadelphia and Reading Coal and Iron's authorized representative tell you they retained something from the amount they got from this other company that was going to use the coal?

A. That's right.

Q. That is what you are calling a royalty?

A. That's right.

Q. They remitted to you the contract price per ton; is that correct?

A. That's right.

Q. You got your full contract price per ton that was provided in the contract?

A. I am assuming yes. I don't know.

Q. You aren't sure whether you got your full contract price per ton or not?

A. No, I am not quite sure. I think I did, but I am not quite sure.

By Mr. Berger:

Q. Who negotiated a price with the other company that bought the coal?

A. I negotiated the price with the other company.

* * * * * * *

[fol. 20] Q. Suppose you delivered coal that was not accepted. Could you get paid then?

A. Well, in those years we never had any coal that was rejected. The market was on the increase, and coal was moving rapidly all along.

Q. Now, did any other person have the right to strip mine either the Stevens or the Philadelphia and Reading areas where you did your prospecting and strip mining?

A. No.

Q. In respect to either the Stevens or the Philadelphia and Reading, were your strip mining operations ahead of or behind the requirements of the coal company, that is, the Philadelphia and Reading Coal and Iron, or the Stevens?

A. Most of the time they were ahead.

Q. Explain that to His Honor.

A. Well, at times I have had as much as 50,000 ton of coal above ground waiting for shipment.

Q. In terms of days and months production, what would that be, 50,000 tons of coal?

A. Well, at the rate that I was shipping at that time, it would be somewhere around 40 working days' supply ahead.

Q. I would like to clarify one thing. In your testimony you have used the personal pronoun "I." "I paid." What did you mean by "I"?

A. When I expressed myself as "I," I mean my brothers and myself.

* * * * * * *

Cross examination.

By Mr. Fink:

* * * * * * * *

Q. Incidentally, can any of this equipment be used for other purposes than coal stripping?

[fol. 21] A. Not very well. It is not adaptable to other types of work, other than possibly the bulldozers and the trucks, possibly.

Q. The trucks can be used for other things?

A. In most cases, the trucks are so heavy you cannot license them on the highway.

Q. Isn't any of this equipment ever used in ordinary highway construction?

A. Not as I can recall any of it being used today.

Q. The trucks are not used in highway construction?

A. Today you can't use the trucks in highway construction unless it is completely off-the-road construction.

Q. Do you know of any stripping contractors who simply enter into an arrangement with the owner of coal land for a certain fee that they will remove this overburden?

A. Yes, there are some operations that pay for the removal of overburden at one figure and the loading and hauling of the coal at another figure.

Q. Has your partnership ever entered into any such arrangements?

A. Never.

Q. You testified on direct examination that you were not compensated for the removal of the overburden; is that correct, sir?

A. That is correct. You don't get paid for removing overburden.

Q. How do you know, sir, that the price paid to you per ton of coal removed did not include a factor for what you had been put to to remove the overburden?

A. Well, there is no question in my mind that the factor is there, but whether the coal, after you remove the overburden, is in sufficient quantities to compensate you for the amount of overburden you remove, you never know until you have removed the overburden.

Q. But you feel that at least the cost that you have been put to in removing the overburden is reflected in the price per ton of coal you will receive if you find the coal?

[fol. 22] A. That's right.

Q. Before these contracts were let, sir, did the Philadelphia and Reading Coal and Iron Company furnish you with any maps of the area?

A. Surface maps.

Q. Did they give you any studies or maps or estimates of the amount of recoverable coal therein?

A. I can't recall it on this particular property that they gave us any estimates as to the amount of coal that was there.

Q. When you say "this particular property," you are referring to the five Tower City stripping tracts?

A. That is correct.

Q. You do not recall if the Philadelphia and Reading Coal and Iron Company gave you any maps or estimates or studies to indicate to you how much marketable coal was believed to be in those tracts?

A. To the best of my knowledge, I don't ever recall of any estimate from the coal company as to the tonnage of coal that would be derived from this stripping.

Q. They gave you maps, did they not, showing you that coal veins——

A. As we term it, surface maps, yes.

Q. I am sorry. I misunderstood you. That is what you mean by the surface maps?

A. The surface map shows where the veins are or where they are supposed to be.

Q. In part, sir, the Philadelphia and Reading Coal and Iron Company gave you that information from the fact that it has been engaged in working in areas adjacent to that area; is that correct?

A. In some cases they get it from direct mining. In other cases, they get it from direct proving.

In this particular property, there were four—or five veins that had been mined on one dip. On the other dip, there hadn't been any mining. It was all virgin territory. So, therefore, that had to be proved.

[fol. 23] Q. How many of the five tracts represented virgin territory when you entered on them?

A. Well, there was—on all of the tracts there was parts of them that had been mined.

* * * * * * *

Q. You testified that the deepest you went in removing overburden was 145 feet?

A. That's correct.

Q. What was the average removal?

A. The average of that was about 110 feet.

Q. 110 is average throughout the tract?

A. Yes.

Q. Do you know, sir, how much it cost you to remove the overburden on P-22?

A. No, I can't tell you that without going back over my figures.

Q. You can't tell me about any of the area?

A. Well, you have all types of overburden on different veins, and your cost of removing rock is lots higher. It is more than twice what it is to remove clay overburden.

Q. So you can't give us any figures without checking your records; is that correct, sir?

A. No, that I would want to do at this time.

Q. How soon after you entered on P-22 were you producing coal?

A. I would say in the neighborhood of about three weeks I was producing a small amount of tonnage.

Q. When did the tonnage start stepping up?

A. Well, I was there at least two months before I got

tonnage that would compensate me and give me a small profit.

Q. How long did you strip on P-22?

A. I stripped there until I completed the P-22 contract.

Q. Do you recall when that was?

Q. (sic) No, I don't, because in between they came in on P-22b, and I moved from one to the other as the veins fol- [fol. 24] lowed through, from one tract to another. I followed through on the veins, and I would come back on that.

Q. How about P-29? When did you start producing coal after your entry on that?

A. I produced some coal off of P-29 shortly after the contract was signed. I don't recall the date of that.

Q. P-32?

A. P-32 was, if I am recalling rightly, over the mining area that there wasn't too much of a problem of finding out where the coal was. The problem was how much was there and how much you could recover.

Q. Did the Philadelphia and Reading Coal and Iron Company have a right to send inspectors on the property?

A. Yes, they did.

Q. Did they exercise that right?

A. Occasionally.

Q. Did they have any right to direct you as to what you should do?

A. Only as far as the contract stated or to the amount of overburden to be removed to the ton of coal, and that was an average over an area.

Q. When you entered into these contracts, what was your estimate of how long it was going to take you to complete them?

A. I had no idea because it wasn't proven in any way, shape, or form, and it was a case of how much coal will you find.

Q. Did you think of it as a contract that might last as much as two to three years?

A. When I went into 22-b, I figured that contract would last between a year and a half and two years, depending, of course, on what coal could be located.

• • • • • • •

Q. Did you have any concern with whether or not the Philadelphia and Reading Coal and Iron Company had sold that coal after you delivered it to them?

[fol. 25] A. I would be concerned to the extent if they didn't sell it I didn't deliver any more.

* * * * * * *

Q. Now, sir, with reference to this conversation about the termination clause on P-22, do you distinctly recall this conversation?

A. Yes, I do.

Q. How soon before you had entered into that contract did this conversation take place?

A. When I got those contracts and read them over, I immediately asked about that particular paragraph in there.

As I said before, I didn't feel I wanted to move equipment on to a job and spend a certain amount of dollars moving it and find out after I had been there I would be put off in 30 days where I would not ever have a chance to get back the money I was investing.

Q. You were not advised by a lawyer?

A. At that time we had no lawyer. We took the men at their word.

Q. Who were you talking to at this time?

A. Charles Brown and Mr. Mulhoff.

Q. Mr. Brown is the man in the court room?

A. Yes he is.

Q. And the other man?

A. Bill Mulhoff. He isn't here today.

Q. Is he alive?

A. Yes.

Q. Did you know what their positions of authority were with the Philadelphia and Reading Coal and Iron Company?

A. Bill Mulhoff was chief engineer, and Charles Brown, as I understand it, was assistant chief.

* * * * * * *

[fol. 26] RUSSELL HUSS, resumed.

Cross examination (Continued).

By Mr. Fink:

Q. Mr. Huss, you have stated that in connection with the Stevens arrangement, the price varied from time to time?

A. That is correct.

Q. I am not certain I recall whether you specified what the price was measured by. What was the price?

A. Well, the price was always determined by the quality, the quality of the coal and the market value of the coal after it had been put on the market.

As time went on, from 1944 to 1947, the coal price increased continuously.

Q. You sold the coal to Stevens who in turn sold it on the market. Is that the situation?

A. That was the situation. I believe—and I am not too positive, but I believe with the Philadelphia and Reading Coal and Iron that they act as a sales company for a portion of their coal.

Q. You did not get a stated price per ton of coal delivered in connection with the Stevens contract?

A. Oh, yes, I got a stated price delivered on a ton of coal.

Q. Was it agreed to before you delivered the coal?

A. Absolutely.

Q. It was agreed to before the market price was then known?

A. The market price was known at that time.

* * * * * * *

[fol. 31] Q. Now, sir, have you continued stripping for Philadelphia and Reading Coal and Iron after 1947?

[fol. 32] A. Yes.

Q. Down through when, sir?

A. Well, I think it is, if I am not mistaken, until February of '54.

Q. You used in that stripping some of the equipment that you had at the end of '47?

A. Well, what I used in that stripping was a new shovel I bought in '47.

Q. What did you do with the equipment at the end of 1947 that you had?

A. Some of it I moved on to other properties, and some of it I sold because I had no further use for it.

Q. Now, sir, did I understand your direct testimony to be you stopped stripping on these lands when you found it to be unprofitable?

A. When I found it to be unprofitable, then I had completed my contract.

Q. When you had completed your contract, isn't that so?

A. And it was unprofitable to go any further.

. . . . . .

Redirect examination.

By Mr. Berger:

Q. If the ratio was higher than 4-to-1 or 6-to-1, could you continue to recover coal?

A. You could if you wanted to if the price would warrant. It would depend entirely on the type of overburden you had to remove.

Q. Were there occasions when you did go beyond the 4-to-1 or 6-to-1 ratio?

A. Yes, I would say there was times that I went over the 4-to-1 or the 6-to-1, and the contracts were worded so it was an average over the property as near as anyone could —now, I wouldn't tell you how much over that I ever went.

. . . . . .

[fol. 33] Defendant's Evidence

Mr. Fink: Mr. Brown, please.

CHARLES E. BROWN, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Fink:

Q. What is your name?
A. Charles E. Brown.
Q. What is your business, Mr. Brown?
A. Mining engineer for the Philadelphia and Reading Coal and Iron Company.
Q. Where are you located for that company?
A. Pottsville, Pennsylvania.
Q. What were your duties with that company from 1944 through 1947?
A. Mining engineer.
Q. Are you in charge of their stripping contracts?
A. I am.
Q. You were in the court room today and heard Mr. Huss testify about a conversation with either you or another gentleman, Mr.——
A. Mulhoff.
Q. Concerning the termination clause contained in P-22, Contract P-22, which is Exhibit P-1 here.
A. (No response.)

The Court: Is that right? Did you hear that testimony?

By Mr. Fink:

Q. Did you hear that testimony?
A. I heard the testimony, yes.

* * * * * * *

[fol. 34] Q. Do you remember any conversations with Mr. Huss shortly prior to the negotiation and execution of P-22?
A. No doubt we talked over with Mr. Huss certain phases of the contract. I don't recall of any particular discussion of the cancellation contracts.

* * * * * * *

Cross examination.

By Mr. Berger:

Q. Now, Mr. Brown, you have testified that an economic study of the price and the—strike that.

You have testified that an economic study of the price was made by your company before these particular contracts were let?

A. That's right.

Q. That is correct, isn't it?

A. That is correct.

Q. And you were familiar with that economic study, weren't you?

A. Yes.

Q. This was brought to your attention even though you personally didn't make the study; isn't that correct?

A. That's right.

Q. And you considered that and took that into account when you negotiated the contracts here with Mr. Huss; isn't that right?

A. Yes, that's right.

• • • • • • •

Recross examination.

By Mr. Berger

Q. When you said that [illegible] have caused the termination of the contract, referring to the economic conditions, that was your opinion; is that right?

A. I am only expressing my opinion.

Q. You are not a lawyer, are you?

[fol. 35] A. I am not.

Q. You don't know the legal rights or duties of your company under the contract, do you?

A. Only as a layman.

Q. Only as a layman.

But are you familiar, sir, in your official capacity, with the fact that these contracts were never terminated unilaterally by the Philadelphia and Reading Coal and Iron Company?

A. That's right, I know that.

Q. And you are familiar also with the fact that when Mr. Huss and his brothers completed the stripping in accordance with their determination with respect to the economic situation that then there was a mutual cancellation agreement between the company and the Husses?

A. After they finished their contract according to the specifications, that's right.

* * * * * * *

[fol. 36]

EXCERPTS FROM PLAINTIFF'S EXHIBIT No. 1.

THE PHILADELPHIA AND READING COAL AND IRON COMPANY
Pottsville, Pennsylvania

CONTRACT

FOR

STRIPPING AND MINING THE VARIOUS VEINS ON THE NORTH AND SOUTH DIPS AT THE TOWER CITY SECTION IN AREAS DESIGNATED BY THE COAL COMPANY'S ENGINEER-STRIPPING No. P-22B

* * * * * * *

ARTICLE 1.—DESC[illegible] OF PROJECT.

It is the understanding o[illegible] parties hereto that this project is a "salvage stripping" operation. CONTRACTOR agrees to assume all risk connected with the prospecting, discovery and recovery of all the coal that is recoverable by stripping in the areas designated by the COAL COMPANY'S ENGINEER.

CONTRACTOR does also hereby covenant, promise and agree, for the consideration hereinafter named, to do all work and provide all the material, labor, tools, equipment, water, light, power, transportation and other facilities unless specified otherwise hereinafter, required for the excavation, removal and disposal of all overburden material and divider slate lying over, between and/or in the veins of coal

and for mining, transporting, and delivery into the raw coal chute at Westwood Breaker of all the raw coal that is recoverable by stripping within the areas designated by COAL COMPANY'S ENGINEER and within the limits set forth by said COAL COMPANY'S ENGINEER, all the above to be done in accordance with the Contract Documents referred to herein and hereto attached, and under the direction and to the satisfaction of COAL COMPANY'S ENGINEER.

* * * * * * *

[fol. 37] ARTICLE 5.—DEFINITION OF TERMS.

* * * * * * *

The term "salvage stripping" as used herein shall be deemed to mean a project wherein COAL COMPANY reserves a coal-bearing area for CONTRACTOR, gives CONTRACTOR permission to enter upon this area and strip it, and agrees to pay CONTRACTOR a specified amount of money for each ton of raw coal that CONTRACTOR delivers to COAL COMPANY at a point and under certain conditions specified by COAL COMPANY. In a "salvage stripping" project COAL COMPANY assumes no responsibility for the discovery of coal, gives CONTRACTOR no guarantee of the quantity of coal in the stripping area and places upon CONTRACTOR all risk in connection with the prospecting, discovery and recovery of coal and the operation of the entire stripping project.

* * * * * * *

ARTICLE 9.—WORK TO BE DONE BY CONTRACTOR.

CONTRACTOR agrees to perform all work required for the prospecting, discovery and recovery of all coal; the removal of overburden; and for the delivery of raw coal into the Raw Coal Chute at Westwood Breaker located at Westwood Colliery and owned by COAL COMPANY; all the above to be done to the extent and under the conditions described in the Contract Documents.

ARTICLE 10.—ITEMS TO BE PROVIDED BY CONTRACTOR.

Unless otherwise stipulated, CONTRACTOR agrees to provide and pay for all materials, labor, tools, equipment,

water, light, power, transportation and other facilities necessary for the execution and completion of the work. Materials or work described in words which so applied have a well-known technical or trade meaning shall be held to refer to such recognized standards.

[fol. 38] ARTICLE 11.—DETERMINATION OF SCOPE OF WORK.

The term "Scope of Work" as used herein is understood by the parties hereto to refer to everything required to extract, process and deliver into the raw coal chute at Westwood Breaker, all of the raw coal that is recoverable by stripping within the areas of the project described in Articles 1 and 2.

* * * * * * *

ARTICLE 15.—REMOVAL AND DISPOSAL OF OVERBURDEN.

CONTRACTOR agrees to remove and dispose of overburden and divider slate as provided in the Specifications.

* * * * * * *

ARTICLE 19.—SCHEDULE OF EQUIPMENT.

CONTRACTOR agrees to have at least the following equipment on the job, with competent and sufficient foremen, operators, and laborers to operate same, and at work within the time specified after each item:—

Name, Type and Size of Equipment:	Equipment Will be at Work on the Job Within Number of Days Indicated Subsequent to Date of This Contract
Power Shovels, Drills, Trucks and Miscellaneous Equipment	
Sufficient power shovels, well drills, trucks, tractors, pumps and other miscellaneous equipment to properly execute the work on this project:	When required.

* * * * * * *

[fol. 39] ARTICLE 22.—SCHEDULE OF COAL EXTRACTION.

CONTRACTOR agrees, unless delayed by fires, strikes, floods or other unavoidable casualties, or by the written instructions of COAL COMPANY, to produce, and to maintain the stripping and mining operations in condition to produce the maximum number of gross tons of raw coal obtainable per single seven (7) hour shift, beginning at a reasonable time after the date of this contract and continuing thereafter to completion of the project.

After completing the removal of coal by dipper shovel, CONTRACTOR shall install drag shovel equipment to recover, to the satisfaction of COAL COMPANY'S ENGINEER, whatever coal that cannot be recovered by dipper shovel.

ARTICLE 23.—SUSPENSION OF WORK.

(a) CONTRACTOR covenants and agrees that COAL COMPANY shall have the right to entirely cancel and terminate this contract, without specifying any reason therefor, upon thirty (30) days' notice in writing to CONTRACTOR of COAL COMPANY'S intention so to do, and in that event COAL COMPANY shall not be liable to CONTRACTOR for any loss of anticipated profits or any other damages whatsoever.

(b) CONTRACTOR further covenants and agrees that COAL COMPANY shall have the right to temporarily suspend work under this contract at any time or times by giving CONTRACTOR written notice of COAL COMPANY'S intention so to do. Should any such temporary suspension be made and continue for a period of five (5) weeks, except in case of strike or lockout, CONTRACTOR may notify COAL COMPANY in writing of CONTRACTOR'S desire to cancel this contract and, if within thirty (30) days after receipt of said notice COAL COMPANY fails to give CONTRACTOR a written order to resume work, then CONTRACTOR may thereupon, by written notice served upon COAL COMPANY, forthwith cancel and terminate this contract. In the event of any such cancella-
[fol. 40] tion by CONTRACTOR, COAL COMPANY shall not be liable to CONTRACTOR for any loss of anticipated profits or other damages whatsoever. If no such notice to cancel this contract has been given by CONTRACTOR and COAL COMPANY

desires at any time a resumption of the work under this contract, it shall so notify CONTRACTOR, and upon receipt of such notice CONTRACTOR agrees that he will, within five (5) days thereafter, resume operation.

• • • • • • • • •

ARTICLE 37.—CONTRACT PRICE.

COAL COMPANY hereby agrees to pay to CONTRACTOR as full compensation for the full performance of all work and for the furnishing of all material, labor, power, tools, machinery, implements and equipment required for the work described by the Contract Documents and by any detailed drawings and specifications which may be hereafter prepared or which work and materials are, in case of dispute, found to be so required; also, for all loss or expense incurred for delays caused by damage to the work or materials or otherwise; also for all loss, damage or expense arising in the progress of the work from unforeseen obstructions or difficulties or other risks connected therewith, the price of one dollar and eighty-five cents ($1.85) per gross ton as determined by scale weight in trucks of CONTRACTOR at COAL COMPANY'S Westwood Colliery for each and every ton of raw coal delivered into the raw coal chute at Westwood Breaker, under the conditions provided in the Contract Documents.

• • • • • • • •

[fol. 42]

IN UNITED STATES DISTRICT COURT

OPINION SUR PLEADINGS AND PROOF—March 26, 1957

Van Dusen, J.

The trial judge makes the following Findings of Fact and Conclusions of Law:

I. FINDINGS OF FACT:

1. Plaintiffs, George Huss, Wesley Huss and Russell Huss, during the years 1944 to 1947, were members of a partnership engaged in the business of mining coal by the

strip mining method, with a principal place of business at Ringtown, Schuylkill County, Pa.

2. Pursuant to written agreements with the Philadelphia and Reading Coal & Iron Co. (hereinafter called "Reading"), denominated P-22, P-22B, P-29, P-32 and P-35, dated, respectively, May 27, 1944, February 23, 1945, May 8, 1945, December 17, 1945, and July 19, 1946 (plaintiffs' Exhibit 1 and Stipulation Exhibits A, B, D, & E), the plaintiffs, in the tax years 1944 to 1947, inclusive, strip mined coal on land owned by Reading in the Good Springs area known as the Tower City Tract, located in Schuylkill County, Pa.

3. Plaintiffs also entered into another strip mining contract with Reading, P-30, dated July 16, 1945, in the Minersville area, about 10 or 12 miles from the Tower City area (Exhibit C; N. T. 86, 87).

4. Further, plaintiffs had periodic oral strip mining arrangements with the Stevens Company (hereinafter called "Stevens") for about four or five different tracts during the years 1944 to 1947, inclusive).[1]

[fol. 43] 5. During these same years, plaintiffs also strip mined for the Jones Coal Company, Jack Jones, and the Peters Creek Coal Company.

6. Defendant Francis R. Smith was Collector of Internal Revenue for the First District of Pennsylvania from May 1, 1945, to November 11, 1952 (Stip. par. 1). All the federal income taxes paid by plaintiffs for the tax years

[1] These contracts on the basis of which plaintiffs claim percentage depletion deductions are those with Western Anthracite and not with Stevens Company. Part of the arrangement included that the coal be sold to Stevens, but the coal could have been sold to another coal company. The prospecting and uncovering of the coal was done by plaintiffs under contracts between Western and plaintiffs. Only when the coal was uncovered did plaintiffs enter into separate agreements with Stevens for the sale of such coal. But since counsel have referred to these coal contracts as the "Stevens" contracts, the court in this opinion will similarly do so, though recognizing that the initial agreements with Western Anthracite are the agreements upon which plaintiffs' claims for percentage depletion are based.

1945 to 1947, inclusive, were paid to the above-stated defendant.

Plaintiffs paid most of their federal income taxes for 1944 to the predecessor in office of the defendant Collector, but in 1946 plaintiffs each paid defendant Collector $987.56 as an additional payment on their 1944 income taxes. Plaintiffs' total payment of income taxes for the year 1944 are in amounts as large as the amounts they seek to recover (Stip. par. 4).

7. The partnership of which plaintiffs are members duly filed its income tax returns for the years 1944, 1945, 1946, and 1947, but in each of said returns of its income it failed to take credit for depletion in connection with the mining contracts aforesaid, and stated the distribution to the individual partners accordingly, with the result that the distributive income of each partner was, by said return, shown to be higher for income tax purposes than it would have been had the statutory percentage depletion been deducted in such statement and return.

8. Plaintiffs, in the years 1948 to 1950, inclusive, each filed claims for refund for the taxable periods 1944 to 1947, inclusive. On these claims, the defendant Collector of Internal Revenue allowed plaintiffs percentage depletion only as to the Jones Coal Company, Jack Jones and the Peters Creek Coal Company, making refunds of a portion of the amounts claimed for those years. To the extent that the claims for refund were not allowed, plaintiffs were denied percentage depletion with respect to the [fol. 44] Reading and Stevens contracts mentioned in paragraphs 2, 3, and 4 above. Statutory notices of such disallowance were sent to each of plaintiffs by registered mail on May 10, 1951 (N. T, 104 and Stip. par. 3).

9. Plaintiff George Huss claimed refunds of $9,861.54 for 1944, $7,189.38 for 1945, $5,728.46 for 1946, and $5,107.20 for 1947.

Plaintiff Russell Huss claimed refunds of $9,861.54 for 1944, $7,270.10 for 1945, $5,720.04 for 1946, and $5,089.91 for 1947.

Plaintiff Wesley Huss claimed refunds of $9,861.54 for 1944, $7,270.10 for 1945, $5,734.30 for 1946, and $5,146.92 for 1947.

The claims for refund of each plaintiff were allowed to the extent of $4,799.65, plus interest, for the year 1944; $1,847.57, plus interest, for the year 1945; and $646.54, plus interest, for the year 1947 (Stip. pars. 2 and 3).

10. Prior to signing the contract of May 27, 1944, (P-22) between plaintiffs and Reading, plaintiffs went onto the land, looked over the ground, and moved in equipment so as to test for the presence of sufficient coal to start the operation.

11. Before the five Tower City stripping contracts (see Finding No. 2) were let, Reading furnished plaintiffs with surface maps showing where the veins of coal were or where they were supposed to be. All of the tracts had been deep-mined and the tract covered by P-22B had been partially strip mined, but plaintiffs were the first to strip mine on the other four areas involved in the Reading contracts.

12. After P-22 was negotiated, plaintiffs never investigated by test boring or prospecting for coal before signing the other contracts. Plaintiffs could see where the land had been previously mined and the thickness of the exposed veins of coal. When the contracts after P-22 were [fol. 45] offered to plaintiffs, they were well acquainted with the tracts being offered and were able to discuss prices for delivery of the coal to the colliery. Except for changes in price due to increased labor costs, plaintiffs entered into all the contracts after P-22 without detailed negotiations of their terms.

13. Plaintiffs' job, in both the Reading and the Stevens contracts, consisted of removing the loose overburden from the top, drilling and shooting the rock overburden, removing this overburden by dragline, cleaning the coal, loading the coal on trucks, and delivering it to the Westwood colliery operated by Stevens. When the coal was delivered to the colliery, it was weighed in and, at the end of each day, plaintiffs got a sheet with the number of loads and the weight of the coal they had delivered.

14. Reading had the right to send inspectors on the property to direct plaintiffs as to the average amount of overburden to be removed in ratio to the coal, and they occasionally exercised that right. The inspector also checked the coal to see whether it was acceptable or not before it was loaded in trucks.

15. The coal from the Forestville area was delivered to the same colliery by railroad cars on the Reading Railroad. Plaintiffs' contract, P-30, called for loading the coal at a siding in Forestville, and, pursuant to a working agreement between Reading and Stevens, one of the latter two paid the freight from the loading point to the colliery.

16. In all of the Reading contracts, plaintiffs were paid a stated price per ton of coal delivered to the colliery (N. T. 33, 35, Article 37 of P-22).[2]

[fol. 46] 17. As to both the Reading and Stevens contracts, plaintiffs themselves determined when and where to begin and to stop the mining in a particular area. They also determined whether or not it would be profitable to begin strip mining. If plaintiffs had determined that it would not have been economically possible, they were not entitled to be reimbursed for their prospecting costs.

18. Plaintiffs paid the men who did the work in this operation and also paid for all of the equipment, supplies and materials.

19. In order to get the equipment to the first job site, plaintiffs spent $10,000. to $15,000. for building roads and moving. This figure, though, includes plaintiffs' labor and supply costs—i.e., the cost of their own employees. One shovel was moved 1½ miles and the other 3½ miles to this first Tower City tract. Both were moved by walking them

[2] Article 37 of all six Reading contracts provided that the price per gross ton was "full compensation for the full performance of all work and for the furnishing of all material, labor, power, tools, machinery, implements and equipment required for the work . . . ; also, for all loss or expense incurred for delays caused by damage to the work or materials or otherwise; also for all loss, damage or expense arising in the progress of the work from unforeseen obstructions or difficulties or other risks connected therewith. . . ."

on their own power. The other Tower City stripping areas were contiguous areas, adjacent to one another, and, except for some equipment purchased to put on those tracts, plaintiffs moved equipment from one tract to another. No equipment was permanently affixed to any of the tracts so as not to be feasibly removed. But none of the equipment could very well be used for purposes other than coal stripping except the bulldozers and trucks.

20. After the stripping of the Forestville tract, the equipment used there was moved to Tower City and, at the end of 1947, plaintiffs' equipment was either moved on to other properties or sold.

21. The equipment initially taken in for the first Tower City contract job in 1944, and not acquired solely for that contract, included two draglines (one 2½-yard and one 3½-yard dragline), bulldozers, drills, air compressors, a number of trucks, and about 15 large trucks and coal haulage trucks, the value of all which was "around $100,000." Other materials used in carrying out the strip mining con- [fol. 47] tracts were all sorts of parts and supplies, cables, fuel oil, motor oil, greases, gasolines, electricity, and parts for machinery. Also, plaintiffs had to construct buildings, shops and supply houses.[3] During the operations on the Tower City contracts, one 2-yard dragline was shifted to another operation. By the end of 1947, plaintiffs had "around $500,000. worth of equipment" on the job. But this same equipment had been used on other coal stripping contracts not with Reading, with the exception of the 3½-yard machine.

22. All of the equipment and supplies used in the contracts with Reading and Stevens were paid for by plaintiffs, but plaintiffs took deductions on their tax returns for all those items—i.e., the labor force and the equipment—as ordinary and necessary expenses of doing business. Also, plaintiffs got depreciation on the described equipment.

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[3] At least one court believes the expenses as outlined above are of doubtful relevance. See *Usibelli v. Commissioner of Internal Revenue*, 229 F. 2d 539, 543 (9th Cir. 1955).

23. About three weeks after entering onto P-22, plaintiffs were producing a small amount of tonnage, but it was at least two months before they got tonnage that would compensate them and give them a small profit. "Some coal" was produced off P-29 shortly after that contract was signed.

24. The Reading contracts required plaintiffs to strip mine coal as long as no more than a specified ratio of cubic yards of overburden per gross ton of raw coal recovered was present (N. T. 137-8, Article 2 of P-22). When the ratio, usually four or six cubic yards of overburden to one ton of coal, ran higher than that specified in the contracts, it would usually be unprofitable to strip mine coal, and plaintiffs were not required to do so. Plaintiffs could continue to strip mine at ratios higher than that specified in the contract if they thought the price warranted their so doing.[4]

[fol. 48] 25. The contract price arrived at in the Reading contracts were arrived at after considering, among other things, the amount of overburden that was to be removed to obtain one ton of coal, the possibility of recoverable coal in the tract, and the length of the haul from the tract to the point of delivery.[5]

26. The negotiations between plaintiffs and Reading for the price of the work to be performed were originally conducted on behalf of Reading by the company's engineer in charge of coal stripping in the area. In determining whether to recommend acceptance of the price to the company, the company engineer had available an economic study prepared by another department of the company, which appraised the future market price of coal. His recommendation to Reading was based upon the fixed costs, his estimate, or the estimate furnished to him, of the future market price of coal, and a figure designed to insure a reasonable margin of profit.

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[4] There were occasions when plaintiffs did continue to strip mine beyond the stated ratio, but generally it was unprofitable to do so.

[5] There is no evidence that plaintiffs, in bargaining for a contract price, contemplated that they would have the depletion tax deduction.

27. The contracts provided for an increase or decrease in the price per ton of coal corresponding to a change in labor costs[6] (Article 38 of P-22, N. T. 38).

28. Except when labor prices changed, plaintiffs were paid the same price per ton of coal delivered whether or not Reading sold it or whatever price Reading obtained on the market. If Reading could not sell the coal or the market price fell, Reading still had to pay plaintiffs the contract price unless they closed the job down (N. T. 103, 109, 110, 156-7; see paragraph 30 below). There was [fol. 49] no change in the contract price because of a change in the market.

29. The coal did not belong to plaintiffs. If Reading rejected the delivered coal, plaintiffs had no right to sell the coal without Reading's agreement. If Reading agreed, then plaintiffs could negotiate the sale of the coal to another colliery. Reading would then collect the purchase price from the buyer and pay plaintiffs the contract price per ton.

30. Reading, in its discretion, could entirely cancel and terminate the contracts prior to the completion of the stripping by giving thirty days' written notice to plaintiffs of its intention to do so (Article 23 in all of the Reading contracts).[7]

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[6] The two supplemental agreements to P-22 of August 20, 1945, and October 28, 1946, respectively raised the price from $1.75 to $1.85 and then to $2.00 (N. T. 35-9 and Exhibit P-1). Increases in wage payments and wage scales obtained by the United Mine Workers in a new United Mine Workers agreement resulted in a rise in the price of coal on the open market within the next three to six months following such increases.

[7] Each of the Reading contracts, except P-22, contained the following language:

> "CONTRACTOR covenants and agrees that COAL COMPANY shall have the right to entirely cancel and terminate this contract, without specifying any reason therefor, upon thirty (30) days' notice in writing to CONTRACTOR of COAL COMPANY's intention so to do, and in that event COAL COMPANY shall not be liable

[fol. 50] 31. No particular duration of time was specified in the agreements with Reading or Stevens and plaintiffs continued to strip mine under the contracts until they reached the stipulated ratios embodied in the contracts and it was no longer profitable to continue stripping. Plaintiffs then had completed their contracts and such contracts were cancelled by mutual agreement. Neither Reading nor Stevens ever unilaterally terminated or suspended operations on any of the contracts.

32. The four or five tracts concerning which the Stevens agreements were made also are in the Good Springs area. In 1944, Stevens had an operating agreement with the owners of the land, the County Commissioners of Schuylkill County, paying them for the right to extract from the land any coal that they located. On or before December

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to CONTRACTOR for any loss of anticipated profits or any other damages whatsoever."

Contract P-22 contained this clause:

"(b) CONTRACTOR further covenants and agrees that COAL COMPANY shall have the right to temporarily suspend work under this contract at any time or times by giving CONTRACTOR written notice of COAL COMPANY's intention so to do. Should any such temporary suspension be made and continue for a period of five (5) weeks, except in case of strike or lockout, CONTRACTOR may notify COAL COMPANY in writing of CONTRACTOR's desire to cancel this contract and, if within thirty (30) days after receipt of said notice COAL COMPANY fails to give CONTRACTOR a written order to resume work, then CONTRACTOR may thereupon, by written notice served upon COAL COMPANY, forthwith cancel and terminate this contract. In the event of any such cancellation by CONTRACTOR COAL COMPANY shall not be liable to CONTRACTOR for any loss of anticipated profits or other damages whatsoever. If no such notice to cancel this contract has been given by CONTRACTOR and COAL COMPANY desires at any time a resumption of the work under this contract, it shall so notify CONTRACTOR, and upon receipt of such notice CONTRACTOR agrees that he will, within five (5) days thereafter, resume operation."

Clause (a) of Article 23 required 30 days' written notice if the contract was to be cancelled after the contractor had completed stripping within the area and limits covered by that contract, but no such 30 days' written notice was required if cancellation was made at any time under clause (b), as quoted above.

31, 1944,[8] Western Anthracite (whose office is at Pottsville) contracted with the County Commissioners and got control of this land.

33. On or before December 31, 1944, plaintiff Russell Huss made an oral agreement for plaintiffs with Anthony Mosseline, of Western Anthracite (hereinafter called "Western"), permitting plaintiffs to go on the land and prospect for coal in return for a stated royalty per ton. If plaintiffs found and uncovered coal, Western could never refuse to let plaintiffs take such coal off the land and sell the coal to whomever they wanted, providing they would pay Western all of their royalties. Thus, as soon as plaintiffs uncovered a vein of coal, a binding obligation was in force between them and Western.

[fol. 51] 34. There was also a working agreement between plaintiffs and Stevens[9] whereby plaintiffs, having the privilege of going on the land from Western, would find a vein of coal and show a sample of it to Joseph Jones of Stevens. A price would then be negotiated between plaintiffs and Stevens. Plaintiffs would deliver the coal to the Westwood colliery and Stevens would pay plaintiffs the agreed upon price and also pay Western the royalty obligation that plaintiffs had to the latter.[10]

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[8] Plaintiff Russell Huss' testimony as to when Western Anthracite contracted with the County Commissioners for control of the lands is admittedly vague as to dates, since he "wasn't concerned about it at the time." He testified that in 1944 someone else could have gone on those lands and extracted coal that they located merely by making arrangements with the County Commissioners, but that in later years the land was controlled by Western Anthracite. At another point in the testimony, he added that he believed the agreement between Western Anthracite and the Commissioners was before "sometime in 1944." He also testified that he made one agreement with Stevens in 1944, and that the others were in 1945, 1946, and 1947. There is no evidence when in 1944 such an agreement was made.

[9] This agreement was made by Russell Huss and Joseph Jones, colliery superintendent of the Westwood colliery.

[10] On some occasions, though, plaintiffs paid a royalty directly to Western. If plaintiffs had sold to someone other than Stevens, then they paid the royalty directly to Western.

35. These individual agreements between plaintiffs and Stevens for the coal from the particular vein contemplated a stated price per ton delivered to the colliery. The stated price per ton was determined after considering such factors as the market value of the coal at the time of the agreement,[11] the quality of the coal, and the length of the haul to the colliery. This agreed upon price was subject to renegotiation at any time.

36. Plaintiffs were not obligated to sell and Stevens was not obligated to buy. At any time Stevens could stop taking coal at the agreed price. If Stevens refused to take the coal, plaintiffs had the right to sell it on the open market. But plaintiffs always sold their coal taken from Western lands to Stevens.

37. Paragraphs 7 (first sentence only, substituting the word "these" for the word "all" and deleting the words "but not limited to" and "quality."), 8,[12] 9 (amended to specify that the testimony did not make clear whether [fol. 52] the Reading or Stevens contracts or both were involved), and 10 requested by plaintiffs are correct but are found by the court to be of slight or no relevancy.

All plaintiffs' requests for Findings of Fact which are inconsistent with the foregoing are denied.

II. Discussion.

Treasury Regulation 111, § 29.23(m)-1, promulgated under the Internal Revenue Code of 1939, outlines the following standard in determining who is entitled to take the percentage depletion deduction for strip mining coal under §§ 23(m) and 114(b) of the Internal Revenue Code of 1939 (26 U. S. C. A. § 23(m) and § 114(b)(4)):

> "The owner of an economic interest in mineral deposits or standing timber is allowed annual depletion

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[11] This market price was necessarily affected by O. P. A. rulings during the period prior to 1947, since increases could only be secured by application to the Government.

[12] In view of the fact that these contracts could be terminated on 30 days' written notice, the provision reserving the area for plaintiffs is of very little, if any, relevance.

> deductions . . . An economic interest is possessed in every case in which the taxpayer has acquired, by investment, any interest in minerals in place or standing timber and secures, by any form of legal relationship, income derived from the severance and sale of the mineral or timber, to which he must look for a return of his capital."[13]

The Supreme Court has stated in *Burton-Sutton Oil Co. v. Commissioner of Int. Rev.*, 328 U. S. 25, 34-5 (1946), an oil depletion case, that "It is the lessor's, lessee's or transferee's 'possibility of profit' from the use of his rights over production, 'dependent solely upon the extraction and sale of the oil,' which marks an economic interest in the oil . . . ," not the title to the mineral in place. "As the oil is extracted and sold, that economic interest in the oil [fol. 53] in place is reduced and the holder or owner of the interest is entitled to his equitable proportion of the depletion as rent or royalty."

The Court of Appeals for the Third Circuit has recently considered this problem in *Commissioner of Internal Rev. v. Mammoth Coal Co.*, 229 F. 2d 535, 537 (3rd Cir. 1955), rehearing denied 229 F. 2d 539 (3rd Cir. 1956), and noted that "there is no general rule that a strip miner is or is not entitled to percentage depletion." What constitutes an economic interest will be determined by "the facts in each case."

Plaintiffs are not entitled to percentage depletion on amounts received under the Reading contracts based on these principles for the following reasons:

A. *The right of plaintiff to strip mine was terminable on thirty days' notice at the will of the owner of the coal lands.*

Under the agreement in the *Mammoth case, supra,* the court said at page 538:

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[13] The regulation continued to state that:

". . . a person who has no capital investment in the mineral deposit or standing timber does not possess an economic interest merely because, through a contractual relation to the owner, he possesses a mere economic advantage derived from production."

"The stripper had the exclusive right to mine coal in the areas embraced by the agreement. This exclusive right was not limited in time but was to continue indefinitely. The (Coal Co.) did have the right to call for a suspension of mining operations, and in such event under certain conditions regarding time and notice the stripper was free to give up the mining operation, but this was his own choice and unless he voluntarily did so, the (Coal Co.), though calling for a suspension of operations, could not permit anyone else to mine the area. Thus, for all practical purposes, the stripper had the exclusive right to mine the area to exhaustion."

On rehearing to consider the coal company's contention in the *Mammoth Coal Co. case* that "the contractor's rights [fol. 54] were at all times terminable by the (Coal Co.)," the court found this not to be true,[14] and stated at page 539:

". . . Usibelli v. Commissioner of Internal Revenue, 9 Cir., 229 F. 2d 539, relied on by the taxpayer, is in complete accord with the disposition which we made in the opinion filed by the Court in this case on November 30, 1955. In Usibelli the Court pointed out that the contract there was terminable at the will of the taxpayer mine owner."[15]

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[14] In the per curiam opinion on the petition for rehearing, the court found that the contract in question "was not terminable at will but only for cause, i.e., bankruptcy or default by (the coal company)." *Commissioner of Internal Rev. v. Mammoth Coal Co.*, 229 F. 2d 535, 539 (3rd Cir. 1956).

[15] In the *Usibelli* case, *supra*, the Ninth Circuit found that a coal stripper on land of the United States, under yearly contracts with the Army to mine specified tonnages for specified sums, was not entitled to depletion deduction for income tax purposes. On page 546 of its opinion, the court found that "the government could in its discretion terminate the contract. (The stripper) had no control over the production output of the mines being limited to the production of a specified amount of coal. . . . The coal came from (the United States') lands and was used by it. (The stripper) took no title to it and accordingly (the stripper's) contention that the coal was sold to the Army is untenable. . . . (The stripper's) gain depended, not as is contended by him upon the severance and

In the Reading contracts in this case, while it appears that the stripper had an exclusive right to mine coal in the areas embraced by the agreements,[16] such right was not to continue indefinitely. Plaintiffs have failed to sustain their burden in proving an oral variation of the terms of Article 23 (the Suspension of Work-clause) in the written contracts[17] and at any time, with proper notice, Reading

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sale of the coal but upon the covenant of the United States Government to pay him a certain sum for services performed. This sum was in no way affected by fluctuation of market price."

[16] See plaintiffs' request for Finding of Fact 8, Finding of Fact 37, and footnote 12.

[17] Plaintiff Russell Huss testified that he and George Huss, a week or two before they signed P-22, the first of the Reading contracts, had a conversation with Charlie Brown and Bill Mulhoff, of the Reading engineering department, at the Reading offices in Pottsville, concerning the cancellation clause in that contract. Plaintiff testified that they inquired whether, if they moved in on the property, spending $10,000. to $30,000. doing so, could Reading cancel out at any time with a 30-day notice, and that they were told that the "provision was put in there in a form contract so as if they got hold of a contractor who was not reputable, who didn't live up to the contract, they could put him off the property without court action."

Charlie Brown, a disinterested party to these proceedings, then took the stand and testified that he didn't recall any particular talk on the cancellation clause of the P-22 contract nor did he have any authority from Reading to alter the terms of their written contracts. Mr. Brown also testified that the operations here in question would not have been continued unless economically feasible. Further, in his opinion, Reading could have terminated the contract if its estimate of the future market price of the coal turned out to be a faulty estimate. But if the margin of profit became narrower, Reading would not necessarily have terminated the contract, but might have gambled on the length of the period.

Further, Article 13 of the Reading contracts provides as follows:

> "No amendment to this contract shall be valid unless the same is made by an instrument in writing executed by COAL COMPANY and by CONTRACTOR, and in case of such amendment, so much of this contract as is not necessarily thereby changed shall remain in force; and no act or conduct of either party shall be held to operate as a waiver of any provision of this contract, unless in writing duly executed by the party against which it is asserted."

[fol. 55] had the right to entirely cancel and terminate the contracts.

B. *Plaintiffs had a right to receive a fixed price per ton, irrespective of the market price.*

In the *Mammoth case*, the court said at page 538:

> "Although all extracted material was to be delivered to the (Coal Co.), the (Coal Co.) specifically reserved the right to reject any and all coal or coal material delivered to it, and thereupon the stripper would be free to sell the rejected coal to anyone it pleased for its own account."

The Third Circuit Court, in awarding percentage depletion deduction to the stripper, reasoned that when the stripper removed coal from the ground, "the (Coal Co.) was entitled to receive it. But the (Coal Co.) was not obligated to take it. If it chose not to, it owed the stripper nothing, and the stripper would be free to sell the coal to anyone at whatever price it could get."

With these factors in mind, the court concluded, also on page 538, that:

> [fol. 56] "The fact that, instead of retaining coal, the stripper received so much per ton for that coal which first had to be offered to and accepted by the (Coal Co.) should make no difference, for in any event the stripper had to look to the coal which it mined for return of its investment and profit."

On the other hand, the situation presented in the Reading contracts is one where plaintiffs were always required to sell the strip mined coal to Reading in return for a stated price per ton delivered to the colliery, such price being adjustable only to reflect the increase or decrease in plaintiffs' labor costs, but not any changes in the market price. If Reading rejected the coal, plaintiffs needed Reading's agreement to sell the coal to another colliery, and even then Reading collected the purchase price from the buyer and paid to plaintiffs the standard contract price per ton.

C. *The coal remained an asset of Reading, rather than of plaintiffs.*

The basic theory involved is "that the deduction be allowed to the owner of wasting assets as compensation for that part of his assets which are used up in production." *Usibelli v. Commissioner of Internal Revenue*, 229 F. 2d 539, 542 (9th Cir. 1955).[18] In *Kirby Petroleum Co. v. Commissioner*, 326 U. S. 599, 603 (1946), the court stated the rule as follows:

> "'The test of the right to depletion is whether the taxpayer has a capital investment in the oil in place which is necessarily reduced as the oil is extracted. See An- [fol. 57] derson v. Helvering, 310 U. S. 404, 407, 60 S. Ct. 952, 954, 84 L. Ed. 1277.'"

Also, in *Commissioner v. Southwest Expl. Co.*, 350 U. S. 308, 312 (1956), depletion was found to be "designed to permit a recoupment of the owner's capital investment in the minerals so that when the minerals are exhausted, the owner's capital is unimpaired." [19]

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[18] In addition, the Ninth Circuit stated, at page 541, that "the depletion deduction . . . is not to be construed . . . as a reward to those persons who actually mine the coal for the risks inherent in extraction. In common with industry generally those engaged in extraction of minerals on a for-hire basis receive their tax benefit through depreciation and obsolescence allowances, and not through an allowance for the depletion of the mineral deposit on which they happen to be working." It is noted that plaintiffs here have received a tax benefit through depreciation deductions on their tax returns (see Finding of Fact No. 22).

[19] In the *Southwest Expl. Co.* case, *supra*, at pp. 315 and 316, a drilling company which contracted to develop oil deposits lying offshore was denied the statutory depletion allowance available to the adjacent upland owner, since "permission to use the upland sites was the express condition precedent to the State's consideration of Southwest's bid," and "proximity to the offshore oil deposits and effect of the state law combined to make the upland owners essential parties to any drilling operations." The upland owners had the requisite economic interest since they "might have realized this value by selling their interest for a stated sum and no problem of depletion would have been presented. . . ." Their "contribution was an investment in the oil in place sufficient to establish their economic interest."

While the test for determining the presence of an economic interest in the mineral in place is not governed by ownership of the land, it is apparent that plaintiffs have not shown that they looked to the severance and sale of the mineral on the open market for their compensation. Instead, it appears that plaintiffs' compensation was directly dependent upon their personal covenants with Reading. The latter did not entitle plaintiffs to a depletion allowance. They, therefore, are not entitled to share in the benefits of a statute which was designed to give compensation to persons interested in the depletion of a wasting asset.

In conclusion, the Reading contracts contemplated: (a) the ability of Reading to terminate the contract at will upon thirty days' notice; (b) a stated price due plaintiffs notwithstanding any fluctuation in the market price; (c) plaintiffs' inability to sell the coal to another colliery on their own initiative; and (d) plaintiffs' not obtaining any separate interest in the coal itself other than that stated in the contractual agreements.

[fol. 58] These factors give the plaintiffs an economic advantage, rather than an economic interest, in the coal in place, and do not entitle them to a percentage depletion deduction.[20]

[fol. 59] The oral agreements comprising the "Stevens contracts," though, are factually very different from the

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[20] Plaintiffs rely upon the liberal view taken by the Fourth Circuit as to when a stripper acquires an economic interest, but all of the cases they cite are clearly distinguishable from the facts before this court.

In *Com. v. Hamill Coal Corp.*, 57-1 U. S. T. C. (CCH) Par. 9259 (4th Cir. 1956), the contract between the stripper and the lessee-coal company contemplated that the stripper's return was to be dependent upon market conditions. The court, at page 56,282, stated that:

". . . the contract specifically provided that the obligation of the taxpayer (lessee-coal company) to pay for the extraction of 16,000 tons of coal per month was dependent upon market conditions, the taxpayer agreeing on its part to give the coal mined by Daniel (coal stripper) the preference in making sales. Thus the parties themselves recognized that the success of the venture and the return to them of their respective

[fol. 60] Reading contracts. Subject to plaintiffs' paying royalties to Western, once they found and uncovered coal, they could remove the coal and sell it to anyone. By the con-

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investments depended upon the taxpayer's ability to make advantageous sales of the product."

Further, the coal stripper there had the duty to furnish at least 16,000 tons of coal per month if the market conditions permitted. Also, annual gross receipts of the strip miner exceeded $500,000. As opposed to this, there is no evidence in the record in this case as to how much coal was available at the minimum acceptable stripping ratio nor the gross receipts from either the Reading or the Stevens contracts. Also, the only statement in the Reading contracts which involved any definite production obligation was Article 22 of the contracts, under which plaintiffs agreed "to produce, and to maintain the stripping and mining operations in condition to produce, the maximum number of gross tons of raw coal obtainable per single seven (7) hour shift, beginning at a reasonable time after the date of this contract and continuing thereafter to completion of the project." But there was nowhere a showing that plaintiffs had to have more than one man on each seven-hour shift. Further, there is no evidence of the gross receipts of the partnership from either the Reading contract or th. (sic) Stevens contract.

The following conclusion of the Fourth Circuit on the above facts, at page 56,283, is, therefore, not inconsistent with the result reached here:

> "In our opinion these conditions created an economic interest in the mineral in place not only in the taxpayer but also in Daniel, both of whom made a substantial investment and took a substantial risk dependent upon the successful sale of the coal."

In contrast to the *Hamill* case, in this case plaintiffs were assured of receiving the stated price per ton of coal produced and the above stated factors were not present. Also, if Reading could not buy the coal, plaintiffs could sell to another and still receive the stated contract price.

Similarly, *Weirton Ice & Coal Sup. Co. v. Commissioner of Int. Rev.*, 231 F. 2d 531 (4th Cir. 1956), cited by plaintiffs, is distinguishable from the facts of our case. In the *Weirton* case, the stripper, who had owned the coal lands, conveyed them at cost to a steel company under an agreement whereby the stripper was to have the exclusive right to mine coal and the land was to be reconveyed to the stripper when the coal was exhausted. Though many of the other provisions of the arrangement were similar to those in the Reading contracts, the conveyance at cost and the contem-

tracts with Stevens, the coal was delivered to the Westwood colliery in return for a stated price per ton, but Stevens was not obligated to buy nor were plaintiffs obligated to sell. At

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plated reconveyance clearly entitled the strippers to their percentage depletion.

In the case of *Commissioner of Internal Rev. v. Gregory Run Coal Co.*, 212 F. 2d 52 (4th Cir. 1954), cited in *Commissioner of Internal Rev. v. Mammoth Coal Co., supra*, at p. 539, as having reached a correct result on the fact situation before it, the coal stripping contracts were very different from the Reading contracts in this case, as indicated under A and B below:

A. As to coal stripping being done by the Swaney Contracting Company and Swaney, Inc. for the lessor of the land, Vincent:

1. At pages 56 and 59 the court recognized that in the arrangements with both Swaney companies "provision was made for adjustment of the compensation in the event of changes in the sales price of the coal." The court also recognized, at page 56, that the stripper, Swaney Contracting Co., "was to be paid for its services on the basis of the coal accepted and paid for by . . . the sales agent of (the coal company)." A similar arrangement existed as to Swaney, Inc. As to Swaney Contracting Co., "the contract was not cancellable except on specified defaults by the parties or in the event that the sales price on the coal fell below $2.76 per ton." As to Swaney, Inc., the lessor, Vincent, could cancel the contract only "if the price of the coal fell to a point where the operations were profitable to him."

2. Further, also at page 59, the court noted that the Swaney companies were to "haul a large tonnage per month and the production was to be continuous and as uniform as possible." Swaney Contracting Co. alone was required to mine and haul "25,000 tons of coal a month" (page 55). See the discussion above in this footnote that plaintiffs in the Reading contracts were not under a similar obligation.

B. In respect to the coal stripping being done by the Summit Fuel Company for the lessee, Gregory Run Coal Company, there was, similarly, a very different factual situation from that present in the Reading contracts:

1. The Gregory Run Company was owned equally by Vincent (the lessor of the land, to the Gregory Run Co.) and a Mr. Williamson. These same parties also each held one-half of the stock in the Summit Fuel Company. Thus, both the lessee and the stripper were owned by the same

any time plaintiffs or Stevens could have discontinued the arrangement and plaintiffs' investments would have been subject to the price of coal on the open market. Further, plaintiffs alone could at any time have stopped strip mining if it was not, in their opinions, profitable to continue.

While plaintiffs, in both the Reading and Stevens contracts, continued to strip mine until no longer profitable and then mutually agreed with the coal company to cancel the contract, only in the Stevens arrangements did they have the undisputed right to continue strip mining after coal had been uncovered. As distinguishable from the Reading contracts, in the Stevens arrangements the stripper, instead of looking merely to a contractual arrangement, had to look to the coal which it mined for return of its investment and profit.[21]

Although it is a close case, the economic interest which the strippers acquired in the Stevens contracts was sufficiently significant to entitle them to percentage depletion.

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persons. The court characterized the arrangement between them on page 55, footnote 2, as a "joint adventure."

2. Further on in the same footnote, the court stated that "either party had the right to cancel the agreement except that in case Gregory served notice of cancellation, then Summit should have the right to mine and remove all the coal which had been uncovered at that time." This clearly gave the stripper distinct rights over the coal in place immediately upon uncovering it.

Even where the views of the Fourth Circuit, as stated in the above three cases, to be at variance with those herein expressed, this court is bound by the views of the Court of Appeals for the Third Circuit.

See, also, *The Virginia B. Coal Company v. Commissioner*, CCH Dec. 21,545; 25 T. C. No. 102, page 2140 (Tax Court 1956), where the coal stripper was held entitled to a depletion allowance because the method for computing the amount which the strippers were to be paid clearly indicated that their possibility of profit and, hence, the recovery of their investment, was dependent to a large extent upon the sale of the coal.

[21] From the Stevens contracts it is clear that plaintiffs did acquire an economic interest in the coal in place immediately upon uncovering the coal. From that point on, they acquired such an interest as met the various tests described in C above.

III. Conclusions of Law

1. This court has jurisdiction over the parties and the subject matter.

2. Plaintiffs, in strip mining under P-22, P-22B, P-29, P-30, P-32 and P-35 for the Philadelphia & Reading Coal & Iron Co., in the tax years 1944 to 1947, inclusive, did not acquire an economic interest in the coal in place, entitling them to the depletion allowance on their gross income [fol. 61] derived therefrom, pursuant to Sections 23(m) and 114(b) of the Internal Revenue Code of 1939.

3. Plaintiffs, in strip mining under oral contracts with the Stevens Company in the tax years 1945 to 1947, inclusive, did acquire an economic interest in the coal in place, entitling them to the depletion allowance on their gross income derived therefrom, pursuant to Sections 23(m) and 114(b) of the Internal Revenue Code of 1939.

4. Plaintiffs have not sustained their burden to prove any definite arrangement of the type outlined in Findings of Fact Nos. 32 to 36 with Stevens or Western for strip mining coal prior to December 31, 1944,[22] and, hence, are not entitled to the depletion allowance under Sections 23(m) and 114(b) of the Internal Revenue Code of 1939 on their 1944 gross income from the Stevens contracts.

5. Plaintiffs' motion filed January 11, 1957, for leave to amend the caption of the complaint to include the United States of America as a party defendant has become moot in view of Findings of Fact Nos. 32 and 33 and Conclusion of Law No. 4.[23]

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[22] The date that Western got control of the involved lands was not established further than "sometime in 1944," and the contradiction exists that in that same year someone else could have made an agreement directly with the County Commissioners and gone upon the land and extracted the coal. Plaintiffs have not sustained the burden of proving the exclusive right to mine the coal they prospected at the time of the alleged one agreement in 1944 with Stevens.

[23] This ruling whether the court has jurisdiction to permit this amendment (since the claims for refunds on which these actions are based were all disallowed by the Commissioner of Internal

[fol. 62] 6. 33 P. S. 1 has no application to the Stevens contracts.[24]

The parties shall, within thirty (30) days of the date of the filing of these Findings of Fact and Conclusions of Law, submit their determination as to the amount of refund due plaintiffs in conformance with the above opinion.

/s/ Francis L. Van Dusen, *J.*

Revenue more than two years ago (Stip. par. 3 and Finding of Fact No. 8)), is unnecessary unless an appellate court modifies such Findings and Conclusion. For a consideration of the merits of this issue, compare Section 3772(a)(2) of the 1939 Internal Revenue Code; *Third Nat. Bank & Trust Co. v. White*, 58 F. 2d 411 (D. Mass. 1932); *Philadelphia H. & P. R. Co. v. Lederer*, 242 Fed. 492 (3rd Cir. 1917); and *Toledo Rys. & Light Co. v. McMaken*, 17 F. Supp. 338 (N. D. Ohio 1936), with Section 3770(b) of the 1939 Internal Revenue Code; 28 U. S. C. A. §§ 1346(a) and 2006; F. R. Civ. P. 15(c) and 21; *Moore Ice Cream Co. v. Rose*, 289 U. S. 373, 380-4 (1933); *Hammond-Knowlton v. United States*, 121 F. 2d 192 (2nd Cir. 1941); *Lamar v. Granger*, 99 F. Supp. 17, 45 (W. D. Pa. 1951); and *United States v. Koike*, 164 F. 2d 155 (9th Cir. 1947). Cf. *Ferd Mulhens, Inc. v. Higgins*, 55 F. Supp. 42, 44 (S. D. N. Y. 1943), and *Rogan v. Delaney*, 110 F. 2d 336 (9th Cir. 1940).

[24] The Statute of Frauds is inapplicable on the facts of this case for any one of the following reasons: (A) The Statute of Frauds cannot be raised by third parties where there is no privity of contract. Restatement of Contracts, § 218; 2 Williston on Contracts, § 530 (Rev. Ed. 1936). See *Burkhart v. Insurance Co.*, 11 Pa. Super. 280, 290-1 (1899); *Berenato v. Gazzara*, 346 Pa. 568 (1943); and *Dietrich v. KDT Coal Co.*, 61 Dauph. 304 (Pa. C. P.). See, also, *Smoot v. Commissioner*, 25 B. T. A. 1038 (1932). (B) Expenditure of money on the faith of the parol agreements makes for a binding contract giving absolute rights. *Cole v. Ellwood Power Co.*, 216 Pa. 283, 289 (1907); *Klingensmith v. Klingensmith*, 375 Pa. 178, 181 (1953); and *Haskell v. Heathcote*, 363 Pa. 184 (1949). (C) The Statute of Frauds does not apply to agreements which have been completely executed and performed on both sides. *Gerlock v. Gabel*, 380 Pa. 471, 476 (1955); *Edwards v. Glaske*, 165 Pa. Super. 108 (1949); *Leap v. Leahey*, 67 Pa. Super. 337 (1917); and *Sferra v. Urling*, 328 Pa. 161 (1937). (D) Each of the oral agreements could have been performed within "the term of three years from the making thereof." See *Bentz v. Barclay*, 294 Pa. 300 (1928).

[fol. 64]

IN UNITED STATES DISTRICT COURT

ORDER FOR JUDGMENT AND CERTIFICATE OF PROBABLE CAUSE—May 28, 1957

(In Appeal No. 12,315—Civil Action No. 14,775.)

Whereas, the above-entitled case came on regularly for trial before the Court sitting without a jury, with the parties appearing by their respective attorneys, and whereas the Court having heard the evidence adduced and having considered the briefs and arguments of the parties did, on March 26, 1957, enter its findings of fact and conclusions of law in favor of the defendant for the tax years 1944 and 1945 and partly in favor of plaintiff and partly in favor of the defendant for the tax years 1946 and 1947, it is hereby

Ordered, Adjudged and Decreed

that judgment be, and the same is hereby, entered in favor of the defendant and against plaintiff for the years 1944 and 1945 and entered in favor of plaintiff and against defendant for the sum of $625.77 for the year 1946, plus interest thereon from March 15, 1947, as allowed by law, and for the sum of $1,134.66 for the year 1947, plus interest thereon from March 2, 1948, as allowed by law, each party bearing his own costs.

[fol. 65] The Court further finds that the defendant, as Collector of Internal Revenue, acted under the direction of the Commissioner of Internal Revenue and upon probable cause in the collection of the taxes involved for the years 1946 and 1947 and that a certificate of probable cause should, therefore, be granted.

It is, therefore, ordered that a certificate of probable cause be, and the same is hereby, issued and entered in the above-entitled cause and that the defendant is hereby ordered relieved from the payment of this judgment and said judgment is ordered paid out of the proper appropriation from the United States Treasury.

/s/ Francis L. Van Dusen, United States District Judge.

....., 1957.

Approved as to Form only, G. Clinton Fogwell, Jr., United States Attorney, Alan J. Swotes, Assistant United States Attorney, Leon H. Kline, Attorney for Plaintiffs.

IN THE UNITED STATES DISTRICT COURT

ORDER FOR JUDGMENT AND CERTIFICATE OF PROBABLE CAUSE—May 28, 1957

(In Appeal No. 12,317—Civil Action No. 14,776.)

Whereas, the above-entitled case came on regularly for trial before the Court sitting without a jury, with the parties appearing by their respective attorneys, and whereas the Court having heard the evidence adduced and having considered the briefs and arguments of the parties did, on March 26, 1957, enter its findings of fact and conclusions [fol. 66] of law in favor of the defendant for the tax years 1944 and 1945 and partly in favor of plaintiff and partly in favor of the defendant for the tax years 1946 and 1947, it is hereby

Ordered, Adjudged and Decreed

that judgment be, and the same is hereby, entered in favor of the defendant and against plaintiff for the years 1944 and 1945 and entered in favor of plaintiff and against defendant for the sum of $624.93 for the year 1946, plus interest thereon from March 15, 1947, as allowed by law, and for the sum of $1,134.67 for the year 1947, plus interest thereon from March 2, 1948, as allowed by law; each party bearing his own costs.

The Court further finds that the defendant, as Collector of Internal Revenue, acted under the direction of the Commissioner of Internal Revenue and upon probable cause in the collection of the taxes involved for the years 1946 and 1947 and that a certificate of probable cause should, therefore, be granted.

It is, therefore, ordered that a certificate of probable cause be, and the same is hereby, issued and entered in the above-entitled cause and that the defendant is hereby ordered relieved from the payment of this judgment and said judgment is ordered paid out of the proper appropriation from the United States Treasury.

/s/ Francis L. Van Dusen, United States District Judge.

....., 1957.

Approved as to Form only, G. Clinton Fogwell, Jr., United States Attorney, Alan J. Swotes, Assistant United States Attorney, Leon H. Kline, Attorney for Plaintiffs.

[fol. 67]

IN THE UNITED STATES DISTRICT COURT

ORDER FOR JUDGMENT AND CERTIFICATE OF PROBABLE CAUSE—May 28, 1957

(In Appeal No. 12,319—Civil Action No. 14,777.)

Whereas, the above-entitled case came on regularly for trial before the Court sitting without a jury, with the parties appearing by their respective attorneys, and whereas the Court having heard the evidence adduced and having considered the briefs and arguments of the parties did, on March 26, 1957, enter its findings of fact and conclusions of law in favor of the defendant for the tax years 1944 and 1945 and partly in favor of plaintiff and partly in favor of the defendant for the tax years 1946 and 1947, it is hereby

Ordered, Adjudged and Decreed

that judgment be, and the same is hereby, entered in favor of the defendant and against plaintiff for the years 1944 and 1945 and entered in favor of plaintiff and against defendant for the sum of $625.78 for the year 1946, plus interest thereon from March 15, 1947, as allowed by law, and for the sum of $1,134.67 for the year 1947, plus interest thereon from March 2, 1948, as allowed by law, each party bearing his own costs.

The Court further finds that the defendant, as Collector of Internal Revenue, acted under the direction of the Commissioner of Internal Revenue and upon probable cause in the collection of the taxes involved for the years 1946 and 1947 and that a certificate of probable cause should, therefore, be granted.

It is, therefore, ordered that a certificate of probable cause be, and the same is hereby, issued and entered in the above-entitled cause and that the defendant is hereby ordered relieved from the payment of this judgment and [fol. 68] said judgment is ordered paid out of the proper appropriation from the United States Treasury.

/s/ Francis L. Van Dusen, United States District Judge.

....., 1957.

Approved as to Form only, G. Clinton Fogwell, Jr., United States Attorney, Alan J. Swotes, Assistant United States Attorney, Leon H. Kline, Attorney for Plaintiffs.

[fol. 69]

IN UNITED STATES DISTRICT COURT

Appellees' Appendix

EXCERPTS FROM TRANSCRIPT OF TESTIMONY

Testimony of Russell Huss.

Cross examination:

* * * * * * *

Q. Before the first of these Tower City stripping contracts was entered into, did the Huss Brothers partnership own any equipment?

A. Oh, yes.

Q. What equipment did you own?

A. We had two 2½ yard shovels, a 3½ yard, a yard and a half, two drills, a number of trucks—I would say in the neighborhood of 15 large trucks, coal haulage trucks, bulldozers, and so forth, and so on.

Q. This is the equipment you placed a value of how much on, sir, approximately?

A. I placed a value on the starting of that contract of about $100,000.

Q. You did not acquire that equipment for this contract; is that correct?

A. Not that particular equipment, not to start this contract.

[fol. 70] Q. Had you been using that same equipment on other coal stripping contracts?

A. Yes, we had, with the exception of the three and a half yard machines.

Q. Were those coal stripping contracts with the Philadelphia and Reading Coal and Iron Company?

A. No, they were not.

Q. How far removed was the tract on which you had been using this $100,000 worth of equipment?

A. Well, I moved one shovel about a mile and a half, and the other one I moved about three and half miles.

Q. How did you move the shovels, sir?

A. On their own power. It was possible to walk them from one mountain to another at that time.

Q. Well, did you have to pay to move any equipment on to that first contract?

A. It cost us a lot of money to move that equipment. You build roads. You can't move it through the bushes. I may not have paid outright for trailer hire or something of that sort any money, but you must build roads to walk the equipment over.

Q. Do you recall in this specific case that you built roads?

A. Oh, yes, I had to.

Q. To walk the equipment over?

A. Yes.

Q. How much did you pay for those roads, do you recall approximately?

A. I can't tell you at this date.

Q. You can't give us any testimony on what you paid to move that equipment on to this tract?

A. Well, I would say it would have run in the neighborhood of $15,000 to move that equipment in.

Q. What was that $15,000 expended for?

A. For roads and moving.

Q. Just roads?

A. Roads and moving.

Q. I understood the moving cost you nothing from the [fol. 71] standpoint of hiring somebody to do it for you.

A. You have to pay all of your labor. You have to pay for all of your supplies. It is the same as a working day.

Q. You are taking into account the cost of your own employees?

A. That's right. It all adds into that cost.

Q. How much of this $15,000 do you want to subtract for the cost of your own employees, gasoline and whatever else it takes to move the equipment?

A. Without the figures before me, I wouldn't say.

Q. You don't know?

A. No, I don't know.

Q. How much it cost you to move on that tract at this point you don't know, do you?

A. I made an estimate of 10 to $15,000.

Q. I am trying to break that down. How much of that 10 to 15 thousand do you want to subtract the cost of your own laborers from?

A. Well, I would have to be truthful, and which I tried to be, I would have to go over my records to see what my costs actually were for labor and supplies on that.

Q. Now, with respect to these Tower City stripping areas covered by the five contracts, were they contiguous areas adjacent to one another?

A. Yes, they were.

Q. You moved equipment off the first tract, let's say, on to one of the other tracts?

A. In some cases. In other cases I bought other equipment to put on those tracts.

Q. Is there any equipment that you purchased that was permanently affixed to any of these tracts and could not be feasibly removed?

A. No.

Mr. Berger: I object to that—I was going to say I object to the question because of the form in which it is put.

[fol. 72] Mr. Fink: What is the objection to the form, sir?

The Court: What is the question again?

(The last question and answer were read as above recorded.)

The Court: Would you state the reason for the objection?

Mr. Berger: I was wondering about the phrase "feasibly removed." I don't know what that means.

The Court: Couldn't be removed I think is what he means. Is that right?

Mr. Fink: Couldn't be removed. I assume you could tear down a lot of things, tear them down and destroy them. I added "feasibly."

By Mr. Fink:

Q. Did you understand?

A. I could move that from one tract to another. They were adjacent to one another.

It would be the same as if I started at Broad and Market and went down to Broad and South, and you had that area into contracts covering those areas, those five contracts.

Q. You had a labor force as well?

A. Oh, yes.

Q. You said you bought supplies and equipment. What does that consist of?

A. Well, it would be gasoline, fuel oil, motor oil, greases, cables, parts for your machinery.

Q. All of these items that you have described, sir. the labor force, fuel, and equipment, you took deductions on your tax returns for those as ordinary and necessary expenses of doing business, didn't you?

A. That's right.

And the equipment you have described here, sir, you got depreciation on, didn't you, sir?

A. That is correct.

* * * * * * *

[fol. 73] Q. Had the coal been put through any cleaning process when you took it to them?

A. At that time, no.

Q. You delivered it to a weigher, did you, so that it could be weighed in?

A. We delivered it across the scales.

Q. And an inspector checked to see whether it was acceptable or not?

A. The inspector checked it at the pit more so than at the scale, before——

Q. He was on the property itself?

A. Yes, before it was loaded in trucks.

Q. Were you given receipts for the coal that you delivered?

A. At the end of a day you got a sheet with the number of loads and the weights of the loads you hauled in.

Q. When were you compensated for that, sir?

A. On the 5th and 25th of each month.

Q. Did you have any concern with whether or not the Philadelphia and Reading Coal and Iron Company had sold that coal after you delivered it to them?

A. I would be concerned to the extent if they didn't sell it I didn't deliver any more.

Q. You were going to be paid for what you delivered whether or not they sold it?

A. That is correct.

Q. If the market price went up, did your rate of compensation change?

A. Only when the labor price changed.

Q. If the market price went down, did your rate of compensation change?

A. I wouldn't know. It never went down in those years.

Q. Now, sir, you know what you contracted for. If the market price had fallen and you had delivered the coal [fol. 74] to the Philadelphia and Reading Coal and Iron Company, they would have had to pay you your contract price; isn't that so?

Mr. Berger: I object to that. We have the contract in evidence. The question calls for a conclusion.

The Court: I will sustain the objection.

By Mr. Fink:

Q. During the years 1944 through 1948, was the Huss Brothers partnership stripping for anyone other than the Philadelphia and Reading Coal and Iron Company and the Stevens Company?

A. Yes.

Q. For whom, sir?

A. Jones Coal Company, Jack Jones, and the Peters Creek Coal Company.

Q. Do you recall, sir, that you claimed percentage depletion with respect to those contracts?

A. Yes.

Q. The Internal Revenue Service allowed them?

A. That is correct.

Q. It denied you percentage depletion only with respect to the two contracts or the two sets of contracts in issue in this lawsuit; isn't that so?

A. That's right.

Q. If coal was rejected by the Philadelphia and Reading Coal and Iron Company, you had no right to sell it elsewhere, did you, sir?

A. I never came into that proposition in those years. The coal market was such that you could sell all of the coal you could possibly mine.

Q. I know, but you described one incident in which some coal was rejected.

A. In later years.

Q. At which time if I correctly understood your testimony, you had to get an agreement from the Philadelphia and Reading Coal and Iron Company to let you endeavor to sell that coal elsewhere?

A. That is correct.

[fol. 75] Q. You had no right to sell that coal without their agreement?

A. No.

Q. That coal did not belong to you, did it, sir?

A. No, it did not belong to me.

Mr. Berger: I object to that as calling for a conclusion of law.

The Court: Mr. Fink, what is your reason in support of the question?

Mr. Fink: What is the point of my question, sir?

The Court: What is your reason in support of the question?

Mr. Fink: We are anxious to prove that the man has no economic interest. There was in his direct testimony a description of this incident of——

The Court: We have covered that.

Mr. Fink: I wasn't sure I clearly understood the time. I will withdraw the question.

The Court: I understand that you think that you may not have understood it, but you asked about three questions, and you came to a final question, and that is the question he is objecting to.

Mr. Fink: I will withdraw it rather than put your Honor to a ruling.

The Court: I am happy to rule. I want to have the record show what your reason for it is and what Mr. Berger's reason for objecting is.

Mr. Berger: Will you read the last couple of questions?

(The court reporter then read back the record as follows:

"Q. You had no right to sell that coal without their agreement?

A. No.

[fol. 76] "Q. That coal did not belong to you, did it, sir?

A. No, it did not belong to me.")

Mr. Berger: I move to strike the question and the answer.

The Court: The last question and answer?

Mr. Berger: Both. The last two.

The Court: The last two?

Mr. Fink: The one that it did not belong to him?

Mr. Berger: Yes. I said both of them have to deal with legal questions, and I am his counsel, and I will advise him what his rights are.

Mr. Fink: I will withdraw the question about the right to sell, but not the question of who did that coal belong to.

Mr. Berger: I certainly press my objection to that, sir.

The Court: I will allow it, and you can state in your brief why I should strike it out. I will allow both questions and answers, and you can cover them both in your brief.

Mr. Berger: All right, sir.

By Mr. Fink:

Q. After you got through with the stripping of Tower City and Forestville, what did you do with the equipment?

A. Well, Forestville finished before Tower City, and I moved that equipment up to Tower City. As Tower City finished up, we moved off on to other contracts in later years, but it was much later than these years in question.

Q. Well, was any of this equipment of Tower City during the years when it was in activity ever shifted over to the other operations during those years?

A. One—one two-yard dragline was shifted, which was [fol. 77] easy to move, from that operation to another one, and possibly back again as the demand for coal either rose or——

Q. You understood me when I said "other operations" to mean other operations which are not in issue in this lawsuit?

A. That's right, there was one small machine we juggled around.

Q. Who paid for the taxes on this property?

Mr. Berger: I object to that.

A. I don't know.

The Court: He doesn't know, so it is all right.

A. (Continuing.) I had nothing to do with that.

By Mr. Fink:

Q. Did you employ any office personnel back in Pottstown or Pottsville?

A. No, I didn't have any offices in Pottsville. My offices at that time were in Ringtown.

Q. In Ringtown.

Did you have an office there, sir?

A. Oh, yes.

Q. Bookkeeping personel, (sic) and so forth?

A. That is correct.

Q. And they serviced all of your operations; is that correct?

A. That is correct.

Q. Now, sir, I understood you to testify that the market price of coal was a factor taken into account in setting this price that you would receive. Did I correctly understand you?

A. That's right.

Q. How do you personally know that the Philadelphia and Reading Coal and Iron Company took that into account?

A. Well, when we first started to strip, and many other contractors started to strip, they started on what we termed as a 4-to-1 ratio because it kept the coal at a dollar value that they could make a dollar on.

[fol. 78] As the price on the retail market increased, they were able to pay more money and naturally went deeper to get the coal at a higher cost.

Q. But how do you know what they were deciding to compensate you on the basis of?

A. They would have to decide on the return on the ton of coal, and my position is that they could not afford to pay me $3 a ton for coal that they sold for $3 a ton and put it through a preparation plan.

Q. By this contract, however, they were obligated to do so if the price fell after you entered into the contract; isn't that so?

A. Or close the job down.

Q. The only adjustment they made for you, though, was that if your labor cost went up, they would give you an adjustment in price; is that correct?

A. That is correct.

* * * * * * * *

Testimony of CHARLES E. BROWN.

Direct examination.

* * * * * * *

Q. You don't recall any particular talk on the cancellation contracts?

A. No.

The Court: You mean on the cancellation clause of the contracts?

The Witness: That's right.

By Mr. Fink:

Q. Sir, do you have any authority from the Philadelphia and Reading Coal and Iron Company to alter the terms of their written contracts?

Mr. Berger: I object, your Honor.
The Court: I will overrule the objection.

A. No, sir, I do not.

[fol. 79] By Mr. Fink:

Q. Did Mr. Mulhoff——

Mr. Berger: I object.

By Mr. Fink:

Q. (Continuing.) —at this time?

The Court: Objection overruled.

A. No, he has not any authority either to change any of the contracts.

By Mr. Fink:

Q. In your capacity, sir, as supervisor of the stripping contracts in the Pottsville area, are you in charge of letting those contracts?

A. My authority is to obtain the bids, work up the economics of the bids and recommend the contractor to do the work.

Q. Are most of these contracts let on bids or by direct negotiation?

A. Most of it is on bids, competitive bids.

Q. Do you have any recollection whether the particular contracts in this case were let on bids or by negotiation?

A. If my memory serves me, these particular contracts, the P-22, I think at that time we negotiated that bid.

Q. You negotiated that one with Mr. Huss directly, or did you try other people at the same time?

A. I think—now, if my memory serves me—it was ten years ago—but at that particular time there were only certain contractors that had equipment, and it was necessary to use the contractors who had that equipment and negotiate a bid.

Q. Well, sir, before you negotiate a contract for the company or before you take bids on a contract for the company, do you and those under your supervision attempt to make some estimate of what a fair contract price would be?

[fol. 80] Mr. Berger: I object.

The Court: I will overrule the objection.

A. We do.

By Mr. Fink:

Q. What factors did you take into account, sir, in making your estimate?

A. We take into an account the amount of unclassified overburden that we are obliged to remove to obtain one ton of coal, giving expression to the type of material and endeavoring to work up a price which we think would be equitable for this particular kind of work from a contractor.

Q. Do you take into account the possibility of recoverable coal in the tract?

A. Yes.

Q. Do you take into account the length of the haul between that tract and whatever the designated delivery point is?

A. Yes, that is an element.

In other words, we take in all of the elements, depending on where the job is, what type the job is, where it is to go, and how it is to be prepared.

Q. You attempt to negotiate a price based on that estimate or accept bids based on that estimate; is that correct?

A. That's right.

Q. Once that contract has been let, is there any change in the contract price because of the change in the market price of the coal?

A. No, sir.

Q. If the market price of the coal falls below the price you have agreed to pay to the contractor, do you stand the loss unless you suspend work?

Mr. Berger: I object, your Honor.

The Court: Would you please read the question?

(The court reporter then read the last question as above recorded.)

[fol. 81] The Court: What is the reason for your objection?

Mr. Berger: Because we have already testimony with respect to the four years in question, and I suggest that the question be rephrased and based on the actuality, not on a hypothetical question.

The Court: I think that is a good suggestion.

Mr. Fink: Well, your Honor——

The Court: We are interested in these contracts, not what might be the practice in connection with other contracts.

Mr. Fink: That is true, and I will withdraw the question, but may I make this statement in connection with that?

We have had a considerable amount of discussion about the market price of coal, that it didn't go down, and that sort of thing. I am trying to get the legal principles here. Perhaps it is unnecessary to do it through a witness because we will have the contracts.

The Court: All right, but please make clear what you are asking. If you think it is relevant to show his general practice as being a person who arranged for contracts where strip mining is concerned, all right, if you are then coming down to the contracts in this case and that serves to qualify it, I think that would be proper. But what we are interested in, obviously, is the situation in this case.

Mr. Fink: Of course.

The Court: The situation as to these particular contracts.

[fol. 82] By Mr. Fink:

Q. Now, were those factors taken into account in fixing the prices in these contracts?

Mr. Berger: I object.

The Court: I will overrule the objection.

A. If I could understand your question, before we let a contract we make an economic study of the price obtaining. We study the market, the market price as far as we know, and then we go ahead on the contract whether the market goes up or down.

By Mr. Fink:

Q. I don't believe you did understand my question, sir, because you have testified to the factors you take into account in letting the stripping contract, and you have said you took into account overburden——

Mr. Berger: Just a moment. I object, your Honor. This is an attempt at cross examination because the counsel is not satisfied with the witness' response.

Mr. Fink: I want to be sure my question was understood.

The Court: Wait a minute, Mr. Berger. You can object and give your reason, but I believe what counsel is asking the witness at this time is whether the general considerations which the witness testified he took into account in setting the prices in contracts were in fact used in setting the prices under these contracts here. I think that is a relevant question.

Mr. Berger: Just so that I can make my point clear——

The Court: Certainly.

[fol. 83] Mr. Berger: I am objecting to the form of his questioning. I am suggesting that Mr. Fink is now cross examining the witness.

The Court: Well, I think that the question ought to be made clearer and more specifically related to these contracts, if that is what you are trying to get at, Mr. Fink.

Mr. Fink: Yes, your Honor. I think what has arisen is that I asked a question of the witness which I am not sure he understood. He has already testified as to what factors were taken into account by him——

The Court: Yes.

Mr. Fink: —in determining what the contract price should be, and then he gave me a response which I do not

believe, when I asked him a specific question about these considerations, was responsive. I think it was not clear.

The Court: I think what you ought to do is start over and rephrase your question and be very careful. I don't think you said anything about these contracts, and that is what confused him.

By Mr. Fink:

Q. What factors, sir, do you take into consideration normally in letting stripping contracts?

The Court: You have already gone over that.

Mr. Berger: I object.

By Mr. Fink:

Q. Did you take those factors into account in letting these contracts which are in issue in this lawsuit?

A. Yes.

[fol. 84] Q. Sir, is it any part of your job in letting these contracts to contractors to take into account the market price of the coal?

A. No, sir.

Q. Do you, however, have—strike that.

Are any studies prepared, however, of the possible market price of coal?

A. I would say yes, but not by the mining engineering department.

Q. Those would be prepared by the company?

A. By the company.

Q. When you recommend a contract to the company, what is your recommendation based upon?

Mr. Berger: I object to the form of that question.

The Court: I will overrule the objection.

Mr. Fink: Perhaps it is cumulative, your Honor, but I want to be sure the record is clear on this.

The Court: Let's not have any more argument. I have overruled the objection. Let's get on.

Will you read the question, please?

(The last question was read by the reporter, as above recorded.)

A. It is based upon the amount of work to be done for a certain amount of money.

Mr. Fink: No further questions.

Redirect examination.

By Mr. Fink:

Q. In recommending your price to the company in these cases, in the case of these contracts, you were considering the costs as you had them fixed as against your estimate or the estimate furnished to you on the future market [fol. 85] price of the coal; is that correct?

A. Yes, that is correct, that's right.

Q. And if the estimate of the future market price of the coal turned out to be a faulty estimate, would that change that contract price you had recommended?

Mr. Berger: I object, your Honor.

The Court: Objection overruled.

A. Well, I would think that in that particular case that may cause the termination of the contract.

By Mr. Fink:

Q. That might have caused the termination of the contract?

A. That's right.

The Court: By whom?

The Witness: By the company, by the coal company.

[fol. 92]

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 12,315
No. 12,317
No. 12,319

GEORGE HUSS, Appellant in No. 12,315,
RUSSELL HUSS, Appellant in No. 12,317,
WESLEY HUSS, Appellant in No. 12,319,

v.

FRANCIS R. SMITH, Collector of Internal Revenue, First District of Pennsylvania.

Appeal From the United States District Court for the Eastern District of Pennsylvania

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Argued December 19, 1957

Before: Biggs, Chief Judge; and Goodrich and Hastie, Circuit Judges.

OPINION OF THE COURT—Filed March 27, 1958

Hastie, Circuit Judge.

These appeals, like those we have decided today in *Parsons v. Smith*, F.2d , challenge a district court ruling that a contracting firm which extracted coal from [fol. 93] the land of another by strip mining was not entitled to claim a percentage depletion allowance in computing its income from that mining operation. Therefore, we will not repeat such of our discussion in *Parsons v. Smith* as presents legal conceptions common to all cases of this type. However, the controversies involve different arrangements between different parties concerning different tracts. And circumstances peculiar to a particular stripping arrangement may be decisive for or against the

claimed depletion deduction. Therefore it is necessary to consider separately and in some detail the facts upon which the stripper relies in this case.

The present contractor, a partnership which we shall call Huss, entered into a written agreement with the Philadelphia and Reading Coal and Iron Co., hereinafter called Reading, concerning the strip mining of certain coal lands owned by Reading. For this work Huss was to be paid an agreed dollar amount per ton of usable ore it should extract and deliver to a colliery designated by Reading. The agreed price was described in the contract as "full compensation for the full performance of all work and for the furnishing of all material, labor, power, tools, machinery, implements and equipment required for the work". The provisions of this contract which relate to compensation are certainly no more favorable to the taxpayers' depletion claim than were the rather similar provisions in the *Parsons* case. In neither case does anything agreed or done about compensation suggest that the stripper acquired an interest in the mineral in place.

On the other hand the facts relating to the duration of the stripping agreement in this case are somewhat different from those in the *Parsons* case. Huss continued to mine the contract area until the parties mutually agreed that additional stripping would not be profitable. In this sense Huss did mine the deposit to exhaustion. However, the stripping contract expressly provided that Reading could cancel the agreement, terminating it unconditionally [fol. 94] and without liability, on thirty days notice in writing. We are not told the reason for including this cancellation clause. We know only that it was part of the contract and that it was not invoked during the course of the mining operation under the contract.

In these circumstances there is more basis for argument here than there was in the *Parsons* case that the bargain contemplated such extensive mining of the area as would warrant characterization of the stripper's status as involving an interest in the mineral in place. Indeed, certain recent decisions of the Court of Appeals for the Fourth Circuit suggest the reasonableness of such an analysis on facts not very different from those here. See *Commis-*

sioner of Internal Revenue v. Hamill Coal Corp., 1956, 239 F.2d 347; *Weirton Ice & Coal Supply Co. v. Commissioner of Internal Revenue*, 1956, 231 F.2d 531. But to us the most that can be said for the stripper's position on the present record is that reasonable men can differ on the inferences they draw from the facts and in the relative values they attribute to various facts in determining the category in which the total situation belongs. Indeed, this contract did not give the stripper the privilege of mining all uncovered coal after notice of termination, which in the *Parsons* case was thought to strengthen the stripper's claim to an interest in the mineral in place. Certainly a reasonable trial judge could view the absolute right of termination on thirty days notice as more significant than the fact that this privilege was not exercised in the given case. And this in substance is what the trial judge did. We cannot find reversible error in this evaluation of the evidence in relation to the rather vague standard the courts must administer in these cases.

Finally, we note that Huss invested a considerable larger sum than did the plaintiffs in the *Parsons* case in drilling and earth moving equipment. At one time Huss committed about $500,000 worth of equipment to this job. [fol. 95] However, the district court found that, except for one item, all of this equipment had utility for stripping operations in general rather than special adaptation to this project. Nothing appears which distinguishes such expenditures from capital expenditures normally made by independent contractors who undertake large projects in such familiar fields as road building and general construction.

We are satisfied that the conclusion of the district court was consistent with the rational application of the legal standards stated in the statute and the implementing Treasury Regulations to the facts at hand. That is enough to require affirmance.

A separate issue is raised on this appeal with reference to so much of the judgment below as denied appellants any depletion allowance for strip mining prior to December 31, 1944 under certain other agreements called the "Stevens contracts". This ruling was explicitly based upon the trial court's conclusion that the taxpayers, who as plaintiffs be-

low had the burden of proof, had failed to establish the existence prior to 1945 of such an agreement as would support a depletion allowance. We have examined the evidence on this branch of the case. It is not so clear and convincing as necessarily to persuade any reasonable trier of fact. We must, therefore, sustain the trial court's finding against the appellants on the facts.

The judgment will be affirmed.

[fol. 96]

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12315 (D. C. No. 14775)

GEORGE HUSS, Appellant,

vs.

FRANCIS R. SMITH, Collector of Internal Revenue, First District of Pennsylvania.

On Appeal from the United States District Court for the Eastern District of Pennsylvania.

Present: Biggs, Chief Judge and Goodrich and Hastie, Circuit Judges.

JUDGMENT—March 27, 1958

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

[fol. 97]

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12317 (D. C. 14776)

RUSSELL HUSS, Appellant,

vs.

FRANCIS R. SMITH, COLLECTOR OF INTERNAL REVENUE,
First District of Pennsylvania.

On Appeal from the United States District Court for the Eastern District of Pennsylvania.

Present: Biggs, Chief Judge and Goodrich and Hastie, Circuit Judges.

JUDGMENT—March 27, 1958

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

[fol. 98]

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12319 (D. C. 14777)

WESLEY HUSS, Appellant,

vs.

FRANCIS R. SMITH, COLLECTOR OF INTERNAL REVENUE,
First District of Pennsylvania.

On Appeal from the United States District Court for the Eastern District of Pennsylvania.

Present: Biggs, Chief Judge and Goodrich and Hastie, Circuit Judges.

JUDGMENT—May 27, 1958

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

[fol. 102]

IN UNITED STATES COURT OF APPEALS

PETITION FOR REHEARING—Filed April 25, 1958

Plaintiffs, George Huss, Russell Huss and Wesley Huss, petition for rehearing pursuant to Rule 33 of the Rules of this Court, upon the following grounds:

1. The Decision of the Court Rests in Part Upon an Error With Respect to the Content of the Record.

The Court, in disposing of the instant cases and the companion appeals in *Parsons v. Smith* (Opinion filed March 27, 1958), gave particular weight to the reasons for the inclusion of termination rights in the stripping arrangements, in determining whether the operations were of such character as to warrant the conclusion that the stripper held an economic interest in the mineral in place.

Thus, in the *Parsons* case, the Court took the view that the desire of the stripper to return at the earliest date to road building, which resulted in the inclusion in the stripping arrangement of a *mutual* ten-day termination clause, indicated the absence of intent to mine to exhaustion.

In the instant cases, the Court said with respect to the so-called thirty-day cancellation privilege of Reading:

"We are not told the reason for including this cancellation clause. We know only that it was part of the con-

tract and that it was not invoked during the course of the mining operation under the contract." (Slip Opinion, p. 3.)

The attention of the Court is respectfully called to the testimony of Russell Huss (App. 10a-12a), that the purpose of the termination clause, as represented to him by the Reading representatives, was to insure the responsibility of the stripper, i.e., to avoid difficulties inherent in terminating the rights of a stripper who proved to be unsatisfactory.

Even without this record, this Court concluded that the plaintiffs have a stronger claim to the characterization of [fol. 103] their status as involving an interest in the mineral in place, and noted that "on facts not very different" the Court of Appeals for the Fourth Circuit had decided in favor of the stripper.

Certainly the disclosure of such record demands reconsideration of this Court's determination to rely upon the exercise of judgment by the district judge on the ground that "on the present record" (Slip Opinion, p. 3), reasonable men could differ on the inferences they draw from the facts and in the relative values they attribute to various facts in determining the category in which the total situation belongs. The district court, it should be observed, refused to consider the testimony above referred to on the ground that it was irrelevant as an attempt by oral evidence to vary the terms of a written contract. However, in the light of the approach of this Court, it is highly relevant to negate a harmful inference of the kind drawn in the *Parsons* case, as well as to substantiate the claim of plaintiffs that extensive strip mining was contemplated by the parties.

It is respectfully submitted that this record renders irresistible the conclusion that the bargain contemplated such extensive mining as to require characterization of the stripper's status as involving an interest in the mineral in place; particularly is this so in light of the additional record facts not simply that plaintiffs actually mined to exhaustion, but especially that the rights of the parties were in fact terminated only by their mutual agreement in writing, and not by unilateral action of Reading.

2. The Decision of the Court Is in Conflict With the Decisions of the Court of Appeals for the Fourth Circuit as Well as the Settled Law of Appellate Review.

This Court indicated (Slip Opinion, p. 3) that, "on facts not very different from those here," the Fourth Circuit has reached a contrary conclusion: *Commissioner v.* [fol. 104] *Hamill Coal Co.*, 239 F. 2d 347 (1956); *Weirton Ice & Coal Supply Co. v. Commissioner*, 231 F. 2d 531 (1956). Indeed, in the latter cases, the Fourth Circuit did not have before it evidence of the character already discussed in this Petition. (The view of the Fourth Circuit is quoted at page 13 of the Plaintiff's brief originally submitted to this Court.)

While recognizing the reasonableness of the analysis of the *Hamill* and *Weirton* decisions, this Court finds the differentiating factor to be the district judge.

Thus, this Court states (Slip Opinion, p. 3):

> "But to us the most that can be said for the stripper's position is that reasonable men can differ on the inferences they draw from the facts and in the relative values they attribute to various factors in determining the category in which the total situation belongs. • • • Certainly a reasonable trial judge could view the absolute right of termination on thirty days notice as more significant than the fact that this privilege was not exercised in a given case. And this, in substance, is what the trial judge did."[1]

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[1] It is submitted that this is not what the district judge did. A reading of the discussion contained in the district court's Opinion (App. 52a-58a) leads to the conclusion that it was unaware that it was dealing in an area of choice. Rather, on the principal issues, market price and terminability, the district court concluded that it was bound by this Court's decision in *Commissioner v. Mammoth Coal Co.*, 229 F. 2d 535 (1955), cert. denied 352 U. S. 824. In this respect it was wrong.

In that case, the stripper had first to offer the coal produced to Mammoth at the contract price; if Mammoth did not require the coal, the stripper was free to sell elsewhere. This Court said that in either event, the stripper was dependent upon production for its return. The district court, erroneously, interpreted this as a

[fol. 105] It is respectfully submitted that this conflicts directly with the decisions of the Court of Appeals for the Fourth Circuit, in which the conclusions of the Tax Court were reversed.

The attempt of this Court to distinguish the instant decision upon the ground given is at variance with the settled law of appellate review where, as here, the facts are not in dispute. Indeed, the Court has in effect adopted the moribund philosophy of *Dobson v. Comissioner*, 320 U. S. 489 (1943), which even in the fullness of vitality was never applicable in the review of judgments of district courts. Certainly in none of the depletion cases cited in the briefs of either the plaintiffs or the government has the appellate tribunal ceded preference to what, in cases of undisputed facts, can only be the legal conclusions of the trial court; and one may witness the unsuccessful plea of the dissent in *Burton-Sutton Oil Co. v. Commissioner*, 328 U. S. 25, 37 (1946). See also, *Commissioner v. P. G. Lake, Inc.*, —— U. S. —— (April 14, 1958).

The Court of Appeals for the Third Circuit has been foremost in recognizing that reasoning from undisputed facts, particularly in connection with statutory concepts, is the responsibility, on review, of the appellate court. In *Brown v. Commissioner*, 131 F. 2d 640 (1942), this Court stated the case:

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requirement that the stripper be permitted to sell elsewhere, and noted that in the instant case the coal was not an "asset" of the Huss brothers. It overlooked the fact that in the *Mammoth* case, any sale elsewhere was at the sufferance of Mammoth. In the instant case, Reading was required to take all of the saleable coal, and the only coal rejected was inferior, non-commercial coal. No problem therefore arises concerning rejected coal. The fact remains that, as with the stripper in the *Mammoth* case, Huss brothers were dependent upon production for their return.

As to terminability, this Court, in the *Mammoth* case, on petition for rehearing, noted that the issue of terminability raised in *Usibelli v. Commissioner*, 229 F. 2d 539 (9th Cir. 1955), was not before it. The district court, erroneously, concluded that this Court regarded non-terminability as essential to the stripper's claim to depletion. Indeed, the opinion in the instant case belies that conclusion, and even the Court in *Usibelli* regarded terminability as a secondary factor.

"Ownership, while based on facts is, we think, a legal concept. If a man has a sufficient number of rights, powers, privileges and immunities with respect to a thing he is, in law, regarded as the owner of it. The number of units in the bundle which makes him an owner for the purpose of property law does not necessarily control the question whether a different number of units makes him the owner with respect to liability [fol. 106] for taxation, as the authorities cited above establish. Whether the settlor of a trust retains a sufficient number to make him liable for the income of the trust as its 'owner' we think is a conclusion of law which this Court, in reviewing the decision of the Board of Tax Appeals, must take the responsibility." (131 F. 2d, at pages 641-642.)

To the same effect are: *In re Kellet Aircraft Corp.*, 186 F. 2d 197, 200 (1950); *Ball v. Paramount Pictures*, 169 F. 2d 317 (1948), cert. denied 339 U. S. 911; *Kuhn v. Princess Lida*, 119 F. 2d 704, 705 (1941).

Accordingly, the conflict with the decision of the Fourth Circuit is patent, and not justified by the review accorded to the plaintiffs in this case. The record in this case overwhelmingly establishes that the real understanding of the parties was that the plaintiffs would be permitted, as they were bound to do, to mine to exhaustion; certainly, at least, to continue strip mining for a substantial period of time.

This Court has erroneously permitted to stand the district court's asserted legal conclusion that plaintiffs had no economic interest in the coal in the place, but upon a completely independent review, that conclusion should be reversed.

3. The Opinion of the Court Is Further Inconsistent With the Decision of This Court in *Mammoth v. Commissioner*, and Reflects a Misconception of Requirements for the Depletion Deduction.

This Court has referred to the "vague standards the courts must administer in these cases." Nevertheless, the decisions of the Supreme Court of the United States furnish an effective guide. Without attempting to repeat the

detailed argument contained in the plaintiffs' brief previously submitted, it must be repeated that a taxpayer is entitled to depletion where he has: (1) acquired, by investment, any interest in the mineral in place, and (2) secured [fol. 107] by legal relationship income derived from the extraction of the mineral, to which he must look for a return of his capital. *Commissioner v. Southwest Exploration Co.*, 350 U. S. 308, 314 (1956), quoting *Palmer v. Bender*, 287 U. S. 551, 557 (1933). As the Supreme Court pointed out, 350 U. S. at 314, the second factor has been interpreted to mean that the taxpayer must look *solely* to the *extraction* of the mineral for his return. In the instant case the plaintiffs were solely dependent upon production for their return. Nothing contained in any of the depletion cases either in the Supreme Court or the Courts of Appeal requires that the producer's return from his production must fluctuate with the market. Indeed, in this respect the determination of this Court is inconsistent with the prior decision of the Court of Appeals for the Third Circuit in *Commissioner v. Mammoth Coal Co.*, 229 F. 2d 535, 538 (1955). See footnote 1, *supra*. It is inconsistent in this respect with the cases decided by the Court of Appeals for the Fourth Circuit.

This Court has emphasized that the price constituted full compensation for all work, and for the materials, labor, machinery, etc. This catalogue is no different from that in the *Mammoth* case. But it is apparent that this was Reading's assurance that it was required to pay only for coal produced, negating any possibility of responsibility for the work of production, and places upon plaintiffs the full risk and burden of production.

The true nature of the arrangement between Reading and the plaintiffs is recorded in Article 5 of the Agreement (App. 37a):

> "The term 'salvage stripping' as used herein shall be deemed to mean a project wherein [Reading] reserves a coal-bearing area for [plaintiffs], gives [plaintiffs] permission to enter upon this area and strip it, and agrees to pay [plaintiffs] a specified amount of money [fol. 108] for each ton of raw coal that [plaintiffs] deliver to [Reading] * * *. In a 'salvage stripping'

> project [Reading] assumes no responsibility for the discovery of coal, gives [plaintiffs] no guarantee of the quantity of coal in the stripping area and places upon [plaintiffs] all risk in connection with the prospecting, discovery and recovery of coal and the operation of the entire stripping project."

It is plaintiffs' position that they have clearly met the second of the two requirements for the depletion allowance. To the extent that this Court found (Slip Opinion, p. 2) nothing of significance in the compensation of plaintiffs, it was in error.

As to the first requirement, it is significant that the term "capital investment" as used in this category of the law, is synonymous with "economic interest." *Burton-Sutton Oil Co. v. Commissioner,* 328 U. S. 25, 29, 32 (1946). This Court has omitted to observe that the requisite economic interest may arise otherwise than through the conventional method of purchase or similar contribution of money or property. No money need actually be invested in the deposit. *Commissioner v. Southwest Exploration Co.,* 350 U. S. 308, 312 (1956). A capital investment may be acquired through gaining a share in the control over extraction or the right of production of the mineral in place. Thus, in *Burton-Sutton Oil Co. v. Commissioner,* it was said the necessary economic interest in the mineral in place arose through "control over extraction." 328 U. S., at 34. It is the possibility of profit from the use of rights over production dependent upon the extraction of the mineral which marks an economic interest. Legal ownership may exist in another, but where control over production exists, such person acquires an economic interest which represents his capital investment and is subject to depletion. *Palmer v. Bender, supra; Lynch v. Alworth-Stephens Co.,* 267 U. S. 364 (1925).

It is undisputed that the allowance for depletion is not dependent upon the legal form of the taxpayer's interest. [fol. 109] The designation of the transaction as a lease, contract, project, or otherwise, is not controlling; only its practical consequences. Whether Reading "leased" to plaintiffs the area or merely "reserved" it, the economic consequences

are the same. And whether Reading reserved a royalty of cash or kind, the economic consequences are the same: for Reading is thereby preserving its economic interest—or capital investment—in the coal in place. That Reading exacts the requirement, in lieu of royalty, that all coal produced be delivered to it at a specified price does not change the character of plaintiffs' interest in the coal in place. At best, it indicates the economic interest of Reading which entitles it to share in the depletion allowance—for Reading did not reserve a royalty or other right in the coal produced, and except for this reservation it would be deemed to have transferred its entire interest in the coal in place. In this respect, Reading merely traded its right to royalty for the right to receive the coal produced at a specified price. The reservation of a reversion by Reading is not material.

Plaintiffs were the producers. Their agreements gave them the right to enter and mine the coal; even though legal ownership in a technical sense remained in the lessor, Reading, they nevertheless acquired an economic interest in the coal which represented their capital investment. They depended solely upon production for their possibility of profit or the return of their investment. No more is required for the depletion allowance.[2] The law requires an economic rather than a legal interest in the oil in place, and to the extent that the Opinion of this Court suggests a different philosophy, it is in error.

[fol. 110] Moreover, there is in this case, even in a literal sense a real and unequivocal capital commitment unobserved by this Court: plaintiffs were obligated to enter

[2] Despite what this Court said in the *Parsons* Opinion (Slip Opinion, pp. 6-7) concerning *Commissioner v. Southwest Exploration Co.*, 350 U. S. 308 (1956), the contribution of the use of their land by the upland owners did not alone establish their economic interest in the oil in place. The upland owners owned no direct legal interest in the oil, and the agreements did not give them a right to enter and drill for oil. It was proximity to the offshore deposits and the effect of the state law which combined to make them parties to any drilling operation. It was this "controlling" position which the Supreme Court emphasized. Quite obviously, the necessary economic interest can be created by the parties through legal forms, the effect of which is the transfer of a right to enter and to extract the mineral.

and to mine to exhaustion. And it was in this sense that they committed their capital resources unreservedly. The purchases of $500,000. of equipment—which this Court and the district court disregarded as depreciable items—constitute tangible expression of this capital commitment. The fact that the equipment was usable for other stripping ventures does not detract from the fact that it was an investment for the stripping projects here involved.

It is respectfully submitted, therefore, that a rehearing is warranted in this case, and that the judgment of the district court should be reversed.

4. With Respect to the "Stevens" Contracts for the Year Prior to 1945, the Court Failed to Recognize That No Issue of Fact Is Involved.

The district court allowed depletion to plaintiffs with respect to the so-called "Stevens" contracts, except for the year prior to 1945. It denied depletion for such year on the ground that plaintiffs failed to establish an *exclusive* right to mine. The area involved was owned by the Commissioners of Schuylkill County (Pennsylvania). In 1944, or prior thereto, the Commissioners made an arrangement with "Western Anthracite," so that thereafter mining rights could only be obtained from it. Plaintiffs' witness, Russell Huss, in his testimony, said that anyone could have obtained mining rights from the Commissioners before they made their arrangement with Western Anthracite (16a). The district court took the view that therefore plaintiff failed to show its rights in 1944 were exclusive. This is a plain mistake. The witness' statement that "anyone" could have made an agreement with the Commissioners did not refer to the terms or conditions of such rights; it merely signified that this was not true after the Western Anthracite arrangement (16a). That this is so, [fol. 111] and that plaintiffs' rights were exclusive is indisputable on the record: the plaintiffs' witness testified that at all times the mining rights they had were exclusive (20a). This is clear particularly because the witness referred to all of the mining rights with respect to the particular tract involved as "Stevens contract" since he sold all the coal produced to Stevens (15a), and on cross-

examination he stated that *all the rights* plaintiffs had were obtained from Western Anthracite (27a). The district court found that rights obtained from Western Anthracite entitled plaintiffs to the depletion deduction, and this is not contested here.

Accordingly, it is submitted that the district court was plainly wrong, that there is no issue of fact in dispute, and that this Court should have set aside the finding of the district court.

5. Conclusion.

For the reasons given, a rehearing should be granted to plaintiffs and the judgments of the district court reversed.

Respectfully submitted,

Leon H. Kline, Murray Milkman, Attorneys for Appellants.

Of Counsel: Berger and Gelman, 1220 P.S.F.S. Bldg., 12 South 12th St., Philadelphia, Pa.

[fol. 112]

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 12,315
No. 12,317
No. 12,319

GEORGE HUSS, Appellant in No. 12,315,
RUSSELL HUSS, Appellant in No. 12,317,
WESLEY HUSS, Appellant in No. 12,319,

v.

FRANCIS R. SMITH, Collector of Internal Revenue, First District of Pennsylvania.

Sur Petition for Rehearing

Present: Biggs, Chief Judge; and Maris, Goodrich, Staley and Hastie, Circuit Judges.

OPINION OF THE COURT—Filed May 29, 1958

Per Curiam:

The petition for rehearing considered, we adhere to our view that the record affords adequate basis for the conclusion of the trial court that the stripper did not have a depletable interest in the mineral in place. It is strongly urged in the present petition that decisions of the Court of Appeals for the Fourth Circuit, cited and discussed in our opinion on this appeal, reach a contrary result on very similar facts. We are not sure what that Court of Appeals would do in reviewing a decision against the stripper on the facts of our case. But regardless of that, we are still persuaded that an affirmance is proper.

The petition will be denied.

[fol. 113] KALODNER, *Circuit Judge*, dissenting

I would grant the petition for rehearing. Further, on rehearing I would reverse the judgment of the district court on the principal issue involved—the existence of an economic interest.

The Supreme Court has charted the course and the law in cases of this type. Only recently it stated, firmly and concisely, that a taxpayer is entitled to the depletion deduction "where he has: (1) 'acquired, by investment, any interest in the oil in place', and (2) secured by legal relationship 'income derived from the extraction of the oil, to which he must look for a return of his capital'". Commissioner v. Southwest Exploration Co., 350 U. S. 308, 314 (1956).

"These two factors usually considered together", said the Supreme Court in the Southwest Exploration case, "constitute the requirement of 'an economic interest.'"

Nothing was said by the Supreme Court in that case on the score as to the impact of a right of termination of a contract creating an economic interest on the existence of that interest in the first place. Nor has the Supreme Court said so in any other case. We did not consider nor did we pass upon this question in Commissioner v. Mammoth Coal, 229 F.2d 255 (1955). Nor has any other appellate court done so except the Fourth Circuit. That Circuit, however, has

explicitly ruled that a right of termination does not destroy an economic interest which existed prior to its exercise. It did so in two cases: Weirton Ice and Coal Supply Co. v. Commissioner, 231 F.2d 531, 533 (1956) and Commissioner v. Hamill Coal Corp., 239 F.2d 347 (1956).

In Weirton it was said (p. 535):

> "It is of no moment that the owner of the mineral, as in other cases in which the right of an extractor to a deduction for depletion has been upheld, had the option to terminate the arrangement at any time, for as the [fol. 114] event proved, Weirton actually mined the coal during all the taxable years."

In Hamill, the contract (entered into in 1944) was to continue for one year and from year to year thereafter with the right of either party to terminate it at any time upon 90 days' written notice. The contract was terminated in 1947 by mutual agreement "after Daniel [the stripper] had removed substantially all the coal with an overburden of less than 40 feet." (p. 349).

In Weirton the decision does not disclose when mining operation ceased or whether the stripper ever mined to exhaustion. In Hamill, however, the record discloses that subsequent to termination the owner of the mine actually mined some 90,000 tons of coal.

In the instant case it is undisputed that the stripper (taxpayers) mined to exhaustion and that the contracts were terminated by mutual agreement after such exhaustion so that the factual situation here is much stronger than in either Weirton or Hamill.

I agree with the view of the Fourth Circuit that the right of termination does not affect a stripper's right to depletion where the requisite economic interest as defined by the Supreme Court exists. The Commissioner and the courts must deal with a situation as it exists during the taxable year involved and not as it might exist in some future year because of the possible occurrence of an event through the exercise of a contractual right.

It is not necessary, however, that I go as far along the course stated in the decision of the instant case. The record here discloses that the termination clause was in-

cluded in the contract as a precaution on the part of the owner to protect itself from possible difficulties with an incompetent stripper.[1] It may be noted parenthetically that [fol. 115] in the opinion sought to be reconsidered it was erroneously stated "We are not told the reason for including this cancellation clause."

Assuredly, prior to the exercise of the termination clause, taxpayers here "had an economic interest in the oil [coal] in place through its [their] control over extraction." Burton-Sutton Oil Co., Inc. v. Commissioner, 328 U.S. 25, 34 (1946). That control, moreover, actually existed, as already said, until the property was mined to exhaustion. Further, as stated in Burton-Sutton Oil Co. "Depletion depends only upon production".

It is the possibility of profit from the use of rights over production dependent upon the extraction of the mineral which marks an economic interest. No money need be invested in the mineral deposit. Commissioner v. Southwest Exploration Co., 350 U.S., at page 312.

There is no room for doubt that the taxpayers had the requisite control over production, for under the contracts, the Coal Company gave to taxpayers the exclusive right to mine all of the merchantable coal in place in the leased area. That such right might have been brought to an end does not affect the present fact that the economic interest existed.

There is also no room for doubt that the taxpayers depended solely upon production for their return, since they received only the agreed price per ton for coal produced and delivered. Indeed, they bore all risks of mining, including, but not limited to, the finding and production of commercial quality coal in such quantities necessary to make operation profitable.

Until now, every appellate decision in this type of case, including our own decision in Commissioner v. Mammoth Coal Co., supra, has held that there is no requirement that the stripper must assume the risks of the ultimate market.

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[1] Russell Huss testified (p. 60 N.T.) that the termination clause "was put in there in a form contract so as if they got hold of a contractor who was not reputable, who wouldn't live up to the contract, they could put him off the property without court action."

To the extent that we now hold otherwise, we are in conflict with our decision in that case and with the decisions of the [fol. 116] Fourth Circuit. We are also in conflict with the latest pronouncement of the Supreme Court, Commissioner v. Southwest Exploration Co., 350 U.S. at page 314, that the taxpayer must look solely to the extraction of the mineral for his return. That is what the taxpayers here had to do.

Although we said, in Commissioner v. Mammoth Coal Co., 229 F.2d at page 537, that "The facts in each case determine the result", I do not regard such declaration as an admission that the criteria to be applied are too vague to do so on other than the basis of "the reasonable man". To the facts must be applied statute and the specific rules pronounced by the Supreme Court in the interpretation of it. That is the teaching of Commissioner v. Southwest Exploration Co., supra.

I conclude, therefore, that the taxpayers during the taxable years involved had the requisite economic interest in the coal in place. This, to me, is the result required by the decisions of the Supreme Court, the Fourth Circuit, and this Court; and our present decision is inconsistent therewith.

Accordingly, I would grant rehearing and reverse the judgments of the district court.

[fol. 117] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[Title omitted]

Present: Biggs, Chief Judge; and Maris, Goodrich, Staley and Hastie, Circuit Judges.

ORDER DENYING REHEARING—May 29, 1958

After due consideration the petition for rehearing in the above-entitled case is hereby denied.

[fol. 119] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 120]

SUPREME COURT OF THE UNITED STATES

No. 305, October Term, 1958

[Title omitted]

ORDER ALLOWING CERTIORARI—October 13, 1958

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted. The case is consolidated with No. 218 and a total of two hours allowed for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 121]

EXHIBIT P-1

CONTRACT
SPECIFICATIONS
DRAWINGS
STIPULATION AGAINST LIENS

FOR

STRIPPING AND MINING THE VARIOUS VEINS ON THE NORTH AND SOUTH DIPS AT THE TOWER CITY SECTION IN AREAS DESIGNATED BY THE COAL COMPANY ENGINEER—STRIPPING NO. P-22.

The Philadelphia & Reading Coal & Iron Co.
Pottsville, Pennsylvania.

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THE PHILADELPHIA AND READING COAL AND IRON COMPANY
Pottsville, Pennsylvania

CONTRACT

FOR

STRIPPING AND MINING THE VARIOUS VEINS ON THE NORTH AND SOUTH DIPS AT THE TOWER CITY SECTION IN AREAS DESIGNATED BY THE COAL COMPANY ENGINEER—STRIPPING NO. P-22

THIS MEMORANDUM OF AGREEMENT, made and entered into this 27th day of May in the year 1944, between GEORGE W. HUSS, RUSSELL N. HUSS and WESLEY W. HUSS, Partners, trading and doing business as GEORGE W. HUSS CONTRACTING COMPANY, a Partnership operating in the State of Pennsylvania (hereinafter referred to as "CONTRACTOR"), party of the first part, and and THE PHILADELPHIA AND READING COAL AND IRON COMPANY, a corporation of the State of Pennsylvania (hereinafter referred to as "COAL COMPANY"), party of the second part,

WITNESSETH: That for and in consideration of the mutual agreements herein contained, it is agreed by and be-

tween the parties hereto, for themselves, their successors, heirs, executors, administrators and assigns as follows:—

PART ONE.—GENERAL

Article 1.—Description of Project.

It is the understanding of the parties hereto that this project is a "salvage stripping" operation. Contractor agrees to assume all risk connected with the prospecting, discovery and recovery of all the coal that is recoverable by stripping in the areas designated by the Coal Company Engineer.

Contractor does also hereby covenant, promise and agree, for the consideration hereinafter named, to do all work and provide all the material, labor, tools, equipment, water, light, power, transportation and other facilities, unless specified otherwise hereinafter, required for the excavation, removal and disposal of all overburden material and divider slate lying over, between and/or in the veins of coal and for mining, transporting, and delivery into the raw coal chute at Westwood Breaker of all the raw coal that is recoverable by stripping within the areas designated by Coal Company Engineer and within the limits set forth by said Coal Company Engineer, all the above to be done in accordance with the Contract Documents referred to herein and hereto attached, and under the direction and to the satisfaction of Coal Company Engineer.

[fol. 127] Article 2.—Location and Limits of Project.

It is the understanding of the parties hereto that the project referred to above is the stripping areas in the various veins on the North and South Dips at the Tower City Section, as designated by the Coal Company Engineer, and located on the Munson and Williams Lands, Porter Township, Schuylkill County, Pennsylvania, which lands are owned by Coal Company.

It is further understood by the parties hereto that the minimum acceptable stripping ratio shall be an average

for the entire project of four (4.0) place cubic yards of overburden per gross ton of raw coal recovered.

PART TWO.—PRELIMINARY CONSIDERATIONS.

Article 3.—Contractor's Familiarity With Project.

It is the understanding of the parties hereto that Contractor has carefully examined all data available concerning the stripping area, has visited the site, has fully informed himself as to all existing conditions and limitations including all laws, ordinances and regulations affecting the contract or the work and has included in the bid price a sum sufficient to cover the cost of all items implied or required to attain the completed conditions contemplated by the contract.

It is further understood that Contractor has familiarized himself with the features and details of the project insofar as they may tie in with his work.

Failure to have complied with the above shall not relieve Contractor of any of the obligations of the contract.

Article 4.—Contract Documents.

The Contract Documents consist of the following parts and each is as fully a part of this contract as if herein inserted at length:

Contract.
Specifications.
Drawings.
Stipulation Against Liens.

These documents are together the documents governing in the execution of this contract and are hereinafter referred to collectively as the "Contract Documents".

The Contract Documents shall be signed in triplicate by Coal Company and Contractor. In case of failure to sign the Specifications, Coal Company shall identify them.

[fol. 128] Article 5.—Definition of Terms.

The term "raw coal" as used herein shall mean the mixture of coal, divider slate and extraneous refuse as it is taken from the stripping.

The term "salvage stripping" as used herein shall be deemed to mean a project wherein COAL COMPANY reserves a coal-bearing area for CONTRACTOR, gives CONTRACTOR permission to enter upon this area and strip it, and agrees to pay CONTRACTOR a specified amount of money for each ton of raw coal that CONTRACTOR delivers to COAL COMPANY at a point and under certain conditions specified by COAL COMPANY. In a "salvage stripping" project COAL COMPANY assumes no responsibility for the discovery of coal, gives CONTRACTOR no guarantee of the quantity of coal in the stripping area and places upon CONTRACTOR all risk in connection with the prospecting, discovery and recovery of coal and the operation of the entire stripping project.

The term "raw coal chute" at Westwood Breaker as used herein shall mean the structure located at Westwood Colliery and is of a suitable design to permit the dumping of the raw coal as contained in the trucks of CONTRACTOR.

"COAL COMPANY ENGINNEER" referred to in the Contract Documents is the Division Engineer (or his authorized representative) of COAL COMPANY Operating Division of which the stripping and mining project covered herein is a part.

The term "subcontractor", as employed in the Contract Documents, includes only those having a direct contract with CONTRACTOR.

"Written Notice" shall be deemed to have been duly served if delivered in person to CONTRACTOR, or to a member of the firm, or to an officer of the corporation for whom it is intended, or if delivered or sent by registered mail, to the addressee at the last business address known to him who gives the notice.

The term "Cubic Yard" as employed in the Contract Documents with reference to overburden is the volume of the overburden material as it exists in place before the start of the proposed work.

The term "Drawings" as employed in the Contract Documents shall be deemed to include all plans, sections, maps, blue prints, photostats, sketches and other similar documents, whether general or detail.

The term "Ton" as employed in the Contract Documents, shall be deemed to mean a gross ton of 2240 pounds.

The term "Overburden" as employed in the Contract Documents, shall be deemed to mean all materials, other than "Divider Slate" and acceptable coal, which it is necessary to excavate, handle, remove and/or dispose of in the course of the work covered by this Contract.

[fol. 129] The term "Extraneous Refuse" as employed in the Contract Documents, shall be deemed to mean material originating outside of the vein or veins or within the vein or veins in the form of major partings which are of such nature and thickness as can, in the opinion of COAL COMPANY ENGINEER, be removed separately from the coal by power shovel.

The term "Divider Slate" as employed in the Contract Documents, shall be deemed to mean any slate, rock or other material (other than acceptable coal) which may be found to exist within the limit of the coal vein or veins included within this stripping and mining operation.

All time limits stated in the Contract Documents are of the essence of the contract.

Article, Section and Paragraph headings and titles are for convenience of reference only, and shall not be construed to affect in any manner the scope or meaning of any article, section or paragraph of this contract.

Throughout the Contract Documents, COAL COMPANY is referred to as neuter gender and singular number and CONTRACTOR as masculine gender and singular number.

ARTICLE 6.—CONTRACT SPECIFICATIONS AND DRAWINGS.

CONTRACTOR agrees that the drawings referred to in the Specifications shall be deemed a part of the Contract and that this Contract, the Specifications and Drawings, are to be considered together in the execution of the Contract.

ARTICLE 7.—SUFFICIENCY OF SPECIFICATIONS.

CONTRACTOR admits that the Specifications are sufficient for their intended purpose; the purpose of the Specifications being to describe the stripping areas and set forth other conditions that CONTRACTOR must fulfill on the project; CONTRACTOR further covenants and agrees to be governed in each case by detail specifications which are to be deemed

a part of the Specifications referred to herein and made a part hereof, although said detail Specifications may not be prepared until after the commencement of said work.

ARTICLE 8.—DIRECTION OF WORK PERFORMED.

CONTRACTOR agrees to perform all work hereunder in accordance with directions that may from time to time be given to CONTRACTOR by COAL COMPANY ENGINEER.

[fol. 130] PART THREE.—OBLIGATIONS OF CONTRACTOR

Work To Be Done

ARTICLE 9.—WORK TO BE DONE BY CONTRACTOR.

CONTRACTOR agrees to perform all work required for the prospecting, discovery and recovery of all coal; the removal of overburden; and for the delivery of raw coal into the Raw Coal Chute at Westwood Breaker located at Westwood Colliery and owned by COAL COMPANY; all the above to be done to the extent and under conditions described in the Contract Documents.

ARTICLE 10.—ITEMS TO BE PROVIDED BY CONTRACTOR.

Unless otherwise stipulated, CONTRACTOR agrees to provide and pay for all materials, labor, tools, equipment, water, light, power, transportation and other facilities necessary for the execution and completion of the work. Materials or work described in words which so applied have a well-known technical or trade meaning shall be held to refer to such recognized standards.

ARTICLE 11.—DETERMINATION OF SCOPE OF WORK.

The term "Scope of Work" as used herein is understood by the parties hereto to refer to everything required to extract, process and deliver into the raw coal chute at Westwood Breaker, all of the raw coal that is recoverable by stripping within the areas of the project described in Articles 1 and 2.

It is the understanding of the parties hereto that the Scope of Work will be determined and controlled by the actual conditions found to prevail with respect to the project and that these conditions must be ascertained by prospecting and proving to be done by the CONTRACTOR at his expense and under the direction of the COAL COMPANY ENGINEER.

ARTICLE 12.—CLAIMS FOR EXTRA COMPENSATION.

COAL COMPANY agrees that COAL COMPANY ENGINEER, in giving directions to CONTRACTOR, shall have authority to make minor changes in the work (excepting changes in the minimum stripping ratio hereinbefore described,) not involving extra cost to COAL COMPANY, and not inconsistent with the general purpose of the work, but the parties hereto mutually covenant and agree that no other changes in the work shall be made unless pursuant to a written order from COAL COMPANY authorizing the change, and stating the lump sum or unit prices to be paid for the same, and CONTRACTOR agrees that he will not make any claim for extra compensation based on any changes not so authorized in writing by COAL COMPANY.

[fol. 131] ARTICLE 13.—AMENDMENTS TO THIS CONTRACT.

No amendment to this contract shall be valid unless the same is made by an instrument in writing executed by COAL COMPANY and by CONTRACTOR, and in case of such amendment, so much of this contract as is not necessarily thereby changed shall remain in force; and no act or conduct of either party shall be held to operate as a waiver of any provision of this contract, unless in writing duly executed by the party against which it is asserted.

Method To Be Used.

ARTICLE 14.—PROCEDURE.

CONTRACTOR agrees to prosecute the work in a diligent, workmanlike manner, to the satisfaction of COAL COMPANY ENGINEER, and in accordance with the procedure and instructions set forth in the Contract Documents.

ARTICLE 15.—REMOVAL AND DISPOSAL OF OVERBURDEN.

CONTRACTOR agrees to remove and dispose of overburden and divider slate as directed by COAL COMPANY ENGINEER and in the manner described in the Specifications.

ARTICLE 16.—CLEANING OPENINGS IN COAL.

CONTRACTOR agrees to clean thoroughly all existing openings in coal and to keep the same free from all materials (other than coal) that may be precipitated into the workings within the limits of the stripping and mining project, all this to be done to the satisfaction of COAL COMPANY ENGINEER.

ARTICLE 17.—DEPOSITING COAL CUT.

CONTRACTOR agrees to pick out carefully, at his own expense, any coal which may be cut during the progress of the removal of overburden and divider slate and to deposit it at such points in the workings as may be designated by COAL COMPANY ENGINEER, this coal to be subsequently recovered during mining operations.

ARTICLE 18.—REMOVAL AND LOADING OUT OF COAL.

CONTRACTOR agrees to remove and load out the coal as directed by COAL COMPANY ENGINEER and in the manner described in the Specifications.

Equipment To Be Used.

ARTICLE 19.—SCHEDULE OF EQUIPMENT.

CONTRACTOR agrees to have at least the following equipment on the job, with competent and sufficient foremen, [fol. 132] operators, and laborers to operate same, and at work within the time specified after each item:—

Name, Type and Size of Equipment:	Equipment Will Be at Work on the Job Within Number of Days Indicated Subsequent to Date of This Contract
Power Shovels, Drills, Trucks and Miscellaneous Equipment	
Sufficient power shovels, well drills, trucks, tractors, pumps and other miscellaneous equipment to properly execute the work on this project	When required.

When Work Is to Be Done

Article 20.—Start of Operations.

Contractor agrees to enter upon the performance of said work within thirty (30) days after date of this Contract and to proceed with it continuously carrying it on at such points and in such order and at such times as he may from time to time be directed by Coal Company Engineer and in no case to proceed without first obtaining from Coal Company Engineer complete directions for the proper execution of work.

Article 21.—Rate of Removal of Overburden.

Contractor agrees, unless delayed by fires, strikes, floods or other unavoidable casualties, or by the written instructions of Coal Company, to remove the overburden and divider slate at such a rate that the coal production requirements as set forth in Article 22 shall at all times be attainable.

Article 22.—Schedule of Coal Extraction.

Contractor agrees, unless delayed by fires, strikes, floods or other unavoidable casualties, or by the written instructions of Coal Company, to produce, and to maintain the stripping and mining operations in condition to produce the maximum number of gross tons of raw coal obtainable per single seven (7) hour shift, beginning at a reasonable time after the date of this contract and continuing thereafter to completion of the project.

After completing the removal of coal by dipper shovel, Contractor shall install drag shovel equipment to recover,

to the satisfaction of COAL COMPANY ENGINEER, whatever coal that cannot be recovered by dipper shovel.

[fol. 133] ARTICLE 23.—SUSPENSION OF WORK.

(a) CONTRACTOR covenants and agrees that this contract may be entirely cancelled and terminated by COAL COMPANY, without incurring any liability whatsoever for so doing, at any time after CONTRACTOR has completed the stripping within the area and limits as to ratio set forth in Article 2. Such option to cancel and terminate entirely may be exercised by COAL COMPANY without specifying any reason therefor upon giving thirty (30) days written notice to CONTRACTOR of COAL COMPANY's intention so to cancel and terminate.

(b) CONTRACTOR further covenants and agrees that COAL COMPANY in any event shall have the option to entirely cancel and terminate this Contract at any time (prior to the completion of the stripping within the area and limits mentioned in the foregoing paragraph) by giving CONTRACTOR written notice of COAL COMPANY's intention so to do and then and in that event COAL COMPANY shall not be liable to CONTRACTOR for any loss of anticipated profits or other damages.

(c) CONTRACTOR further covenants and agrees that COAL COMPANY shall have the right to temporarily suspend work under this Contract at any time or times by giving CONTRACTOR written notice of COAL COMPANY's intention so to do. Should any such temporary suspension be made and continue for a period of five (5) weeks, except in case of strike or lockout, CONTRACTOR may notify COAL COMPANY in writing of CONTRACTOR's desire to cancel this contract and, if within thirty (30) days after receipt of said notice COAL COMPANY fails to give CONTRACTOR a written order to resume work, then CONTRACTOR may thereupon, by written notice served upon COAL COMPANY, forthwith cancel and terminate this contract. In the event of any such cancellation by CONTRACTOR, COAL COMPANY shall not be liable to CONTRACTOR for any loss of anticipated profits or other damages. If no such notice to cancel this contract has been given by CONTRACTOR and COAL COMPANY desires at

any time a resumption of the work under this Contract, it shall so notify CONTRACTOR, and upon receipt of such notice CONTRACTOR agrees that he will, within five (5) days thereafter, resume operation.

ARTICLE 24.—INTERRUPTION OF WORK.

It is the understanding of both parties that COAL COMPANY shall in no wise be held liable to CONTRACTOR for any interruptions or hindrance to the regular and continuous prosecution of the work to be performed by CONTRACTOR under the terms of this contract that may be caused by strikes of the workmen of COAL COMPANY, or through the interference of such workmen of COAL COMPANY with the workmen of CONTRACTOR, or that may be caused by any other occurrences beyond the control of COAL COMPANY.

[fol. 134] *Other Obligations of* CONTRACTOR.

ARTICLE 25.—TAXES; OLD AGE BENEFITS, WORKMEN'S COMPENSATION, UNEMPLOYMENT INSURANCE AND PUBLIC LIABILITY INSURANCE.

CONTRACTOR agrees that he and each of his subcontractors will deduct from the wages of his, its, or their employees and pay over to the proper authorities any tax or taxes as required by any State or Federal Laws and will comply with all State and Federal Laws relating to Old Age Benefits, Workmen's Compensation and Unemployment Insurance, including provision for the payment of Workmen's Compensation benefits to his employees or their dependents in accordance with the laws of the Commonwealth of Pennsylvania and all amendments thereto.

CONTRACTOR also agrees that he and each of his subcontractors shall carry a Public Liability Policy, with limits of at least $25,000 for any one person and $50,000 for any one accident. Before any of the employees of CONTRACTOR or employees of his subcontractors shall do any work upon the premises of COAL COMPANY, CONTRACTOR agrees to furnish COAL COMPANY with a certificate that such insurance coverage has been provided; said certificate to contain the date when the coverage expires. CONTRACTOR

agrees that the coverage shall not be cancelled until after all work required by this Contract is completed.

ARTICLE 26.—SURETY BOND.

If COAL COMPANY so requests, CONTRACTOR agrees to deliver to said COAL COMPANY, before the expiration of fifteen (15) days from the date of such request and, before any further payment hereunder shall become due from COAL COMPANY, a bond for the faithful performance of this Contract by CONTRACTOR in a form and in a penal sum satisfactory to COAL COMPANY executed by CONTRACTOR as principal and by a surety company satisfactory to COAL COMPANY as surety, the cost of said bond to be paid by COAL COMPANY.

ARTICLE 27.—PERMITS FROM PUBLIC AUTHORITIES.

CONTRACTOR agrees to obtain and pay for all permits from public authorities which may be required in connection with the performance of this contract, and to comply with all municipal and other public laws, ordinances, and requirements in regard to the same, and with all rules and regulations of any insurance companies which may have issued policies upon any part of the work or who may be asked to do so. CONTRACTOR also agrees to comply with the lawful orders of any public authority made from time to time in respect to the work to be done hereunder.

ARTICLE 28.—EMPLOYEES.

CONTRACTOR agrees to employ competent workmen and foremen, and immediately to discharge, whenever ordered to do so by COAL COMPANY, any person considered by COAL COMPANY incompetent, or disposed to be disorderly, and further agrees not again to employ such person upon the work.

[fol. 135] ARTICLE 29.—WATCHMEN.

It is the understanding of the parties hereto that COAL COMPANY shall not be responsible for the loss of or damage to the property of CONTRACTOR and/or his subcontractors (if any) from any cause. CONTRACTOR shall furnish what-

ever watchmen he finds necessary adequately to protect his interests.

ARTICLE 30.—PRECAUTIONS TO BE TAKEN BY CONTRACTOR.

CONTRACTOR agrees to use due care throughout the work, and that whenever the Specifications for any part of the work are, in his opinion, faulty, or at variance with any rules or ordinances applying to the work, or are such as will, if followed, result in unsafe conditions or will cause the work to result in pecuniary loss to COAL COMPANY or in any damage or loss to persons or property, he will instantly stop work on the portion affected thereby and immediately notify COAL COMPANY in writing of such opinion, and in what respect he considers said Specifications are faulty or at variance as aforesaid and CONTRACTOR will not proceed with the part of the work so affected until he has received a written order from COAL COMPANY ENGINEER directing what is to be done and when to proceed.

ARTICLE 31.—PROTECTION OF COAL COMPANY.

CONTRACTOR further covenants and agrees that he will indemnify and save harmless COAL COMPANY, its successors and assigns, of and from any loss, damage, cost, charge or expense, whether direct or indirect and whether to persons or property, to which COAL COMPANY, or its successors or assigns, may be subjected by any act, action, neglect or default on the part of CONTRACTOR or his subcontractors or any of CONTRACTOR'S or sub-contractors' officers, agents or employees.

If at any time during the progress of the work, CONTRACTOR shall allow any indebtedness to become due for labor, materials or services, whether said indebtedness may or may not become a lien or liens upon property of COAL COMPANY, or whether said indebtedness may or may not become a claim against COAL COMPANY, and shall permit said indebtedness to remain unpaid for a period of fifteen (15) days, CONTRACTOR shall immediately upon request from COAL COMPANY, pay the same, or cause the same to be secured by giving a bond, or otherwise, and in case of his failure so to do, COAL COMPANY, at its option, may with-

hold any money due CONTRACTOR until such indebtedness is paid or may apply such money towards the discharge thereof, or may forthwith terminate the employment of CONTRACTOR and proceed in accordance with the provisions of Article 47 hereof.

ARTICLE 32.—LIABILITY FOR DAMAGE TO OTHER CONTRACTORS.

If CONTRACTOR should cause damage to any other contractor on the stripping and mining operations, he agrees upon due notice to settle with such other contractor by agreement or arbitration. If any other contractor claiming damages sues COAL COMPANY on account of any damage alleged to have been sustained, COAL COMPANY shall notify CONTRACTOR who agrees to defend such proceedings at his [fol. 136] own expense. If any judgment against COAL COMPANY arises therefrom, CONTRACTOR agrees to pay or satisfy it and pay all costs incurred by COAL COMPANY.

ARTICLE 33.—SUBCONTRACTING AND ASSIGNING.

CONTRACTOR further covenants and agrees that he will not sell, assign, transfer or set over this contract or any part or interest therein to any person or persons whomsoever, without the consent in writing of COAL COMPANY, and any such sale, assignment or transfer, without such written consent from COAL COMPANY, shall be null and void. Any subcontracts entered into by CONTRACTOR shall be submitted to COAL COMPANY for approval and COAL COMPANY shall have the right to reject any subcontractor whom COAL COMPANY considers incompetent or unable satisfactorily to perform the portion of the work involved, and in that case such subcontractor shall do no work hereunder.

CONTRACTOR agrees to impose on the subcontractors under his charge the same responsibilities which CONTRACTOR assumes by these terms and conditions and the contract in general, and CONTRACTOR agrees that he will be fully responsible to COAL COMPANY for the acts and omissions of his subcontractors and of persons either directly or indirectly employed by all subcontractors.

ARTICLE 34.—LIENS.

No claim or mechanic's lien shall be filed by anyone against the tracts of ground upon which the stripping and mining operations are to be conducted or the buildings, machinery, or other "structure" (as defined by the Pennsylvania Mechanics Lien Act), erected thereon or any part thereof, whether so conducted, erected and constructed strictly in accordance with the provisions of the Contract Documents, or in accordance with any amendments thereof. CONTRACTOR shall execute in a form supplied by and acceptable to COAL COMPANY a separate agreement with COAL COMPANY to this effect so that the same may be duly filed.

ARTICLE 35.—COAL COMPANY'S OCCUPANCY OF PREMISES.

CONTRACTOR agrees that COAL COMPANY may, during the progress of the work, place and install or cause to be placed and installed within the area covered by these stripping and mining operations such other structures, equipment and materials and may carry on such other operations as it may deem desirable for its own purposes, before the completion of the various parts of the work, provided, however, that such use of portions of said area shall not substantially interfere with the work of CONTRACTOR, and CONTRACTOR further agrees that such placing and installation of structures, equipment and material shall not in any way evidence the completion of the work or any portion of it, nor shall be deemed or construed to signify COAL COMPANY's acceptance of the work or any part thereof.

[fol. 137] ARTICLE 36.—REMOVAL OF CONTRACTOR'S EQUIPMENT.

Upon the completion of the work to the satisfaction of COAL COMPANY, CONTRACTOR agrees to remove from the premises at his own expense all equipment, machinery and structures used by him in the said stripping and mining operations.

PART FOUR.—OBLIGATIONS OF COAL COMPANY

Prices To Be Paid for the Work.

Article 37.—Contract Price.

Coal Company hereby agrees to pay to Contractor as full compensation for the full performance of all work and for the furnishing of all material, labor, power, tools, machinery, implements and equipment required for the work described by the Contract Documents and by any detailed drawings and specifications which may be hereafter prepared or which work and materials are, in case of dispute, found to be so required; also, for all loss or expense incurred for delays caused by damage to the work or materials or otherwise; also for all loss, damage or expense arising in the progress of the work from unforeseen obstructions or difficulties or other risks connected therewith, the price of one dollar and seventy-five cents ($1.75) per gross ton as determined by scale weight in trucks of Contractor at Coal Company's Westwood Colliery for each and every ton of raw coal delivered into the raw coal chute at Westwood Breaker, under the conditions provided in the Contract Documents.

Article 38.—Stripping Work Wage Scale.

It is hereby agreed that the contract price under this contract is based on the wage scale as provided in the wage agreements and/or special or local agreements between the United Mine Workers of America and the Anthracite Operators of November 17, 1917, and subsequent agreements of November 15, 1918, September 2, 1920, September 19, 1923, February 17, 1926, August 8, 1930, May 7, 1936, May 26, 1939, May 20, 1941, January 9, 1943, and the National War Labor Board directive order dated October 28, 1943 and the memorandum of agreement between Messrs. Harold A. Ickes, Secretary of the Interior, and John L. Lewis, President of the United Mine Workers of America dated November 3, 1943 for this class of work in the Anthracite region.

In the event of an increase or decrease in the labor costs of Contractor by reason of an increase or decrease of the

labor wage scale, the contract price to be paid to CONTRACTOR hereunder shall be increased or decreased in an amount equal to such increased or decreased labor cost to CONTRACTOR.

CONTRACTOR hereby agrees to keep at all times adequate books of account and cost records, including records of all wages paid to labor, to immediately post said books upon request of COAL COMPANY so to do, and to permit COAL COMPANY at all reasonable times to examine and take extracts from said records for the purpose of determining the amount of any increase or decrease in CONTRACTOR'S labor costs by reason of any such change in the labor wage scale.

In case the books of account and cost records kept by CONTRACTOR are insufficient or in improper form to permit [fol. 138] COAL COMPANY to ascertain the amount of any increase or decrease in contractor's labor costs by reason of change in the labor wage scale, then and in that event COAL COMPANY shall specify what increase or decrease shall be made in the contract prices as compensation for any such increase or decrease in the labor wage scale and CONTRACTOR shall accept same.

Terms of Payment.

ARTICLE 39.—TIME AND METHOD OF PAYMENT.

The time and method of payment will be as follows:

CONTRACTOR will be paid on the regular stripping semi-monthly pay day schedule for each and every ton of raw coal that passes over the raw coal scale at COAL COMPANY'S Westwood Colliery during the period covered by the pay day schedule.

An amount equivalent to five cents (5¢) per ton of raw coal will be retained by COAL COMPANY from each semi-monthly estimate until the sum of twenty-five hundred dollars ($2500.00) will have accumulated, which sum will be held by COAL COMPANY until the completion of this Contract as a guarantee for the faithful performance by CONTRACTOR of this Contract.

Other Obligations of COAL COMPANY

ARTICLE 40.—

Blank.

ARTICLE 41.—

Blank.

ARTICLE 42.—

Blank.

ARTICLE 43.—

Blank.

ARTICLE 44.—PROVIDE DRAWINGS.

COAL COMPANY agrees to furnish to CONTRACTOR, free of charge, all copies of Drawings and Specifications reasonably necessary for the execution of the work.

It is the understanding of both parties that all drawings, specifications and copies thereof furnished by COAL COMPANY shall remain the property of COAL COMPANY. No part or all of these shall be used by CONTRACTOR on other work and, with the exception of the Specifications attached to CONTRACTOR's original copy of this Contract, they shall be returned to COAL COMPANY upon request upon termination of his work under this contract.

[fol. 139] ARTICLE 45.—SURVEYS, LINES AND GRADES.

COAL COMPANY ENGINEER will furnish surveys establishing with sufficient definiteness grade lines for the construction of all transportation and/or other facilities by CONTRACTOR.

ARTICLE 46.—TEMPORARY BUILDINGS.

COAL COMPANY agrees to permit CONTRACTOR to erect at his own expense at such points and places as COAL COMPANY ENGINEER shall designate for the purpose, such buildings as

may be necessary to carry on the work under this agreement, which buildings are to be removed by CONTRACTOR upon termination of his work done under this Contract. If CONTRACTOR fails to so remove said buildings, COAL COMPANY may do so at CONTRACTOR'S expense and CONTRACTOR agrees to immediately pay the same upon receipt of a bill therefore from COAL COMPANY, or COAL COMPANY may deduct such amount from sums then due and owing the CONTRACTOR by COAL COMPANY.

PART FIVE.—GENERAL PROVISIONS.

ARTICLE 47.—FORFEITURE OF CONTRACT.

In the event that CONTRACTOR should at any time refuse or neglect to supply a sufficient number of properly skilled workmen, plant, equipment or materials of the proper quantity or quality or fail in any respect to prosecute the work with sufficient promptness and diligence, or fail in the performance of any of the covenants and agreements herein contained, such refusal, neglect or failure being certified by COAL COMPANY ENGINEER, COAL COMPANY shall be at liberty, after three days' written notice to CONTRACTOR, to provide any such labor, plant, equipment or materials, and to deduct the cost thereof from any money then due or thereafter to become due to CONTRACTOR under this contract; and if said COAL COMPANY ENGINEER shall certify that such refusal, neglect or failure is sufficient ground for such action, COAL COMPANY shall also be at liberty to terminate the employment of CONTRACTOR for the said work and to enter upon the premises and take possession, for the purpose of completing the work included under this contract, of all plant, equipment, materials, tools, and appliances thereon, and to employ any other person or persons to finish the work, and to provide the materials therefore; and in case of such discontinuance of the employment of CONTRACTOR he shall not be entitled to receive any further payment under this contract until the said work shall be wholly finished, at which time, if the unpaid balance of the amount to be paid under this contract shall exceed the expense incurred by COAL COMPANY in finishing the work, such excess shall be paid by COAL COMPANY to CONTRACTOR.

But if such expense shall exceed such unpaid balance, CONTRACTOR shall pay the difference to COAL COMPANY. The expense incurred by COAL COMPANY as herein provided, either for furnishing materials or for finishing the work, and any damage incurred through such default, shall be audited and certified by the Treasurer of COAL COMPANY whose certificate thereof shall be conclusive upon the parties unless objected to in writing within ten days from certification and service. In case an objection to the certificate [fol. 140] of the Treasurer shall be filed within the time specified as aforesaid, the accuracy of the said certificate shall be determined by arbitration.

ARTICLE 48.—ARBITRATION.

Whenever under any of the provisions of this Contract it is provided that any question shall be determined by arbitration at the instance of either COAL COMPANY or CONTRACTOR, the question at the time in dispute shall be determined by three arbitrators selected or appointed as hereinafter provided. The party desiring arbitration shall give written notice to the other party setting forth in general terms the question or questions to be arbitrated and determined and the section or sections of this Contract under which the right of arbitration arises, and in said notice shall appoint an arbitrator. Within ten days thereafter the party so notified shall appoint in writing an arbitrator and shall give written notice of such appointment to the party desiring arbitration; but if within said ten days the said arbitrator is not so appointed and notified to the party desiring arbitration, then the party desiring arbitration may make application to the then President of The Fidelity-Philadelphia Trust Company of Philadelphia for the appointment of such arbitrator; and it is hereby agreed that the said President may appoint such arbitrator. The first arbitrator and the second arbitrator so appointed shall, within ten days after the appointment of the latter, select a third arbitrator, but if they shall fail so to do within said period of ten days, either party may make application to the then President of The Fidelity-Philadelphia Trust Company of Philadelphia for the appointment of a

third arbitrator, and it is hereby agreed that the said President may appoint such arbitrator. The decision of a majority of the three arbitrators so appointed and selected shall be final, binding and conclusive upon both parties hereto without any right of appeal therefrom to any Court, except such as is provided for in the Act of Assembly of the Commonwealth of Pennsylvania approved April 25, 1927, P. L. 381. Each party shall bear its own cost and expense of arbitration. The costs and expenses incurred by the arbitrators, including their reasonable compensation, shall be paid in equal shares by COAL COMPANY and CONTRACTOR.

The provisions of the said Act of Assembly of the Commonwealth of Pennsylvania, as the same may be amended and supplemented from time to time, shall be applicable to the arbitration herein provided for.

ARTICLE 49.—PREVIOUS COMMUNICATIONS.

All previous communications between the parties hereto, either verbal or written, are hereby abrogated and withdrawn, and this contract with the Specifications referred to herein constitutes the whole agreement between the parties hereto.

[fol. 141] IN WITNESS WHEREOF, the parties to this agreement have hereunto set their hands and seals as of the day and year first above written.

Signed, sealed and delivered
in the presence of us:

/s/ Jos. W. CHAMBERLAIN /s/ GEORGE W. HUSS (SEAL)
George W. Huss

/s/ Jos. W. CHAMBERLAIN /s/ RUSSELL N. HUSS (SEAL)
Russell N. Huss

/s/ Jos. W. CHAMBERLAIN /s/ WESLEY W. HUSS (SEAL)
Wesley W. Huss

Partners, Trading and Doing Business
as GEORGE W. HUSS CONTRACTING COMPANY,
a Partnership.

CONTRACTOR.

THE PHILADELPHIA AND READING COAL AND IRON COMPANY (SEAL)

By /s/ R. E. TAGGART
President

Attest: /s/ M. P. McDERMOTT
Secretary

COAL COMPANY

[fol. 143]

SPECIFICATIONS

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[fol. 144]

SPECIFICATIONS
FOR

STRIPPING AND MINING THE VARIOUS VEINS ON THE NORTH AND SOUTH DIPS AT TOWER CITY SECTION, IN AREAS DESIGNATED BY THE COAL COMPANY ENGINEER—STRIPPING NO. P-22

The Philadelphia and Reading Coal and Iron Company,
Pottsville, Pennsylvania.

I.—GENERAL.

This Specification and Drawings listed hereinunder are a part of the "Contract Documents" which shall apply in full and in part.

II.—DRAWINGS.

The drawings above referred to are the mine maps of the COAL COMPANY that are available for reference in the COAL COMPANY'S office.

III.—DESCRIPTION OF PROJECT.

The work covered by this specification includes the performance of all work and the furnishing and paying for all the material, labor, tools, equipment, water, light, power, transportation and other facilities, unless specified otherwise, hereinafter, required for the excavation, removal and disposal of all overburden materials and divider slate lying over, between and/or in the veins of coal and for mining, transporting to and delivery into the raw coal chute at Westwood Breaker of all the raw coal that is recoverable by stripping in the area designated by COAL COMPANY ENGINEER and within the limits set forth by said COAL COMPANY ENGINEER, all the above to be done in accordance with the Contract Documents referred to herein.

IV.—LOCATION AND LIMITS OF PROJECT.

It is the understanding of the parties hereto that the project referred to above is the stripping areas in the various veins on the North and South Dips at the Tower City Section, as designated by the COAL COMPANY ENGINEER and located on the Munson and Williams Lands, Porter Township, Schuylkill County, Pennsylvania, which lands are owned by COAL COMPANY.

It is further understood by the parties hereto that the minimum acceptable stripping ratio shall be an average for the entire project of four (4.0) place cubic yards of overburden per gross ton of raw coal recovered.

[fol. 145] V.—PROCEDURE.

CONTRACTOR shall conduct stripping and mining operations on the project in a manner which will permit producing coal at the rate and under the conditions described in Article 22 of the Contract.

VI.—OVERBURDEN DISPOSAL.

CONTRACTOR will comply with instructions from COAL COMPANY ENGINEER regarding the disposal of overburden.

VII.—REMOVAL OF SURFACE REFUSE.

All surface stone, dirt and clay washed into the stripping pits must be kept out of the coal loaded by CONTRACTOR at his own expense.

VIII.—REFUSE IN RAW COAL.

CONTRACTOR shall so conduct stripping and mining operations as to keep at a minimum "extraneous refuse" loaded with the coal, and he agrees to be controlled in this matter by the instructions of COAL COMPANY ENGINEER, and to be bound by his decision.

IX.—POINT OF DELIVERY OF COAL.

CONTRACTOR will deliver and dump the raw coal into the raw coal chute at Westwood Breaker owned by COAL COMPANY and located at Westwood Colliery.

X.—RAW COAL CHUTE AT WESTWOOD BREAKER.

COAL COMPANY agrees to permit CONTRACTOR to enter upon COAL COMPANY premises for delivery of raw coal to the raw coal chute at Westwood Breaker.

XI.—OTHER PROVISIONS.

(a) Power

CONTRACTOR shall, at his own expense, provide all power required for operation of the project.

(b) Water

CONTRACTOR shall, at his own expense, provide all water required for operation of the project.

(c) Roads and Track

CONTRACTOR shall, at his own expense, provide all roads and/or tracks required for the handling, removal and dis-

posal of overburden and coal, and for delivery of raw coal to the raw coal chute at Westwood Breaker.

[fol. 146] *(d) Outlet Cuts*

CONTRACTOR shall, at his own expense, provide all outlet cuts required for the handling, removal and disposal of overburden and coal, and for delivery of raw coal mined to the raw coal chute at Westwood Breaker.

(e) Railroad Siding

The Reading Railroad spur tracks at Good Spring are at present available to the CONTRACTOR for bringing to the project all equipment and materials required for the completion of the work on the project.

CONTRACTOR shall provide all facilities and labor to unload and store all his own material, apparatus and equipment, and shall be entirely responsible for same.

Less-than-carload shipments shall be handled through the nearest local railroad freight house, and CONTRACTOR shall arrange for the delivery of such shipments to the location of his job.

[fol. 148] MINE MAPS AND CROSS SECTIONS OF THE TOWER CITY SECTION ARE AVAILABLE FOR REFERENCE IN THE OFFICE OF THE COAL COMPANY ENGINEER, POTTSVILLE, PA.

[fol. 150]

IN THE COURT OF COMMON PLEAS,

COUNTY OF SCHUYLKILL.

No. ....., ... Term, 19....

MECHANICS LIEN DOCKET No. .....

THE PHILADELPHIA AND READING COAL AND IRON COMPANY, (COAL COMPANY)

v.

GEORGE W. HUSS CONTRACTING COMPANY (CONTRACTOR)

STIPULATION AGAINST LIENS.

WHEREAS, on the 27th day of May, 1944 a contract was entered into between THE PHILADELPHIA AND READING COAL AND IRON COMPANY, a Corporation of the State of Pennsylvania (hereinafter called "COAL COMPANY") and GEORGE W. HUSS, RUSSELL N. HUSS AND WESLEY W. HUSS, Partners, trading and doing business as GEORGE W. HUSS CONTRACTING COMPANY, a Partnership operating in the State of Pennsylvania (hereinafter called "CONTRACTOR") wherein and whereby said CONTRACTOR undertook and agreed to perform certain stripping and mining operations in the various veins on the North and South Dips at the Tower City Section in areas designated by the COAL COMPANY ENGINEER, and to erect and construct certain buildings (if necessary) and other structures (as defined by the Pennsylvania Mechanics Lien Act) hereinafter generally referred to as "structures" upon parts or all of certain tract of ground in Porter Township, Schuylkill County, Pennsylvania, known as the Munson and Williams Lands, which lands are owned by COAL COMPANY; the raw coal chute at Westwood Breaker is located on the John Lesher Tract;

with respect to all of which said COAL COMPANY is the owner.

NOW, THEREFORE, THIS AGREEMENT WITNESSETH, that for and in consideration of the sum on one dollar ($1.00) to

said CONTRACTOR in hand paid by said COAL COMPANY, the receipt whereof is hereby acknowledged, and the further consideration mentioned in the contract aforesaid, said CONTRACTOR, for itself, himself and/or themselves and for its, his or their subcontractors and all parties acting through or under it, him, them or any of them, hereby covenants and agrees that no mechanics' claims or liens shall be filed or maintained by it, him, them or any of them, against the said structures and the lot of ground appurtenant thereto, or any of them, for or on account of any work done or materials or labor furnished by it, him, them or any of them, under said agreement or otherwise, for, towards, in or about the construction and erection of the said structure or structures, or any of them, and the said CONTRACTOR, for itself, himself and/or themselves and for [fol. 151] its, his or their subcontractors, and others under it, him or them, hereby expressly waives and relinquishes the right to have, file or maintain any mechanic's lien or claim against the said structures, or any of them, and agrees that this agreement waiving the right of lien shall be an independent covenant.

WITNESS our hands and seals this 27th day of May, 1944.

Signed, sealed and delivered
in the presence of:

/s/ Jos. W. CHAMBERLAIN /s/ GEORGE W. HUSS (SEAL)
George W. Huss

/s/ Jos. W. CHAMBERLAIN /s/ RUSSELL N. HUSS (SEAL)
Russell N. Huss

/s/ Jos. W. CHAMBERLAIN /s/ WESLEY W. HUSS (SEAL)
Wesley W. Huss

Partners, Trading and Doing Business
as GEORGE W. HUSS CONTRACTING COMPANY
a Partnership.

CONTRACTOR.

THE PHILADELPHIA AND READING COAL AND IRON COMPANY (SEAL)

By /s/ R. E. TAGGART
President

Attest: /s/ M. P. McDERMOTT
Secretary

COAL COMPANY.

[fol. 152]

The PHILADELPHIA *and* READING COAL *and* IRON COMPANY

READING TERMINAL

[Emblem]

PHILADELPHIA 5, PA.

POTTSVILLE, PA.
August 22, 1945.

Geo. W. Huss Contracting Company,
Centralia, Penna.

Gentlemen:—

We send you, herewith, for your record and file, an executed copy of the Supplemental Agreement dated August 20, 1945, covering changes to Articles 37 and 38 of the contract for Tower City Stripping No. P-22, between yourselves and this company.

Very truly yours,

/s/ WM. C. MUEHLHOF
Wm. C. Muehlhof
CHIEF ENGINEER.

M/r
cc-GAR
GJC
CHK

[fol. 153] SUPPLEMENTAL AGREEMENT

WITNESS: THIS SUPPLEMENTAL AGREEMENT made this 20th day of August in the year 1945 between GEORGE W. HUSS, RUSSELL N. HUSS and WESLEY W. HUSS, trading and doing business as GEORGE W. HUSS CONTRACTING COMPANY, a Partnership, operating in the Commonwealth of Pennsylvania (hereinafter referred to as "CONTRACTOR"), party of the first part, and THE PHILADELPHIA AND READING COAL AND IRON COMPANY, a Corporation of the Commonwealth of Pennsylvania (hereinafter referred to as "COAL COMPANY"), party of the second part,

WHEREAS, under date of May 27, 1944, COAL COMPANY and CONTRACTOR executed an Agreement covering the so-called Stripping No. P-22, and

WHEREAS, Article 37 and Article 38 of said Agreement dated May 27, 1944, provide as follows:

ARTICLE 37.—CONTRACT PRICE.

"COAL COMPANY hereby agrees to pay to CONTRACTOR as full compensation for the full performance of all work and for the furnishing of all material, labor, power, tools, machinery, implements and equipment required for the work described by the Contract Documents and by any detailed drawings and specifications which may be hereafter prepared or which work and materials are, in case of dispute, found to be so required; also, for all loss or expense incurred for delays caused by damage to the work or materials or otherwise; also for all loss, damage or expense arising in the progress of the work from unforeseen obstructions or difficulties or other risks connected therewith, the price of one dollar and seventy-five cents ($1.75) per gross ton as determined by scale weight in trucks of CONTRACTOR at COAL COMPANY's Westwood Colliery for each and every ton of raw coal delivered into the raw coal chute at Westwood Breaker, under the conditions provided in the Contract Documents."

ARTICLE 38.—STRIPPING WORK WAGE SCALE.

"It is hereby agreed that the contract price under this contract is based on the wage scale as provided in the wage agreements and/or special or local agreements between the United Mine Workers of America and the Anthracite Operators of November 17, 1917, and subsequent agreements of November 15, 1918, September 2, 1920, September 19, 1923, February 17, 1926, August 8, 1930, May 7, 1936, May 26, 1939, May 20, 1941, January 9, 1943, and the National War Labor Board directive order dated October 28, 1943 and the memorandum of agreement between Messrs. Harold A. Ickes, Secretary of the Interior, and John L. Lewis, President of the United Mine Workers of America dated November 3, 1943 for this class of work in the [fol. 154] Anthracite region.

"In the event of an increase or decrease in the labor costs of CONTRACTOR by reason of an increase or decrease of the labor wage scale, the contract price to be paid to CONTRACTOR hereunder shall be increased or decreased in an amount equal to such increased or decreased labor cost to CONTRACTOR.

"CONTRACTOR hereby agrees to keep at all times adequate books of account and cost records, including records of all wages paid to labor, to immediately post said books upon request of COAL COMPANY so to do, and to permit COAL COMPANY at all reasonable times to examine and take extracts from said records for the purpose of determining the amount of any increase or decrease in CONTRACTOR's labor costs by reason of any such change in the labor wage scale.

"In case the books of account and cost records kept by CONTRACTOR are insufficient or in improper form to permit COAL COMPANY to ascertain the amount of any increase or decrease in CONTRACTOR's labor costs by reason of change in the labor wage scale, then and in that event COAL COMPANY shall specify what increase or decrease shall be made in the contract prices as compensation for any such increase or decrease in the labor wage scale and CONTRACTOR shall accept same."

And Whereas, due to the Wage Agreement of May 19, 1945, between the United Mine Workers of America and the Anthracite Operators, it is desired to amend said Article 37 and Article 38 of said agreement,

Now, Therefore, it is mutually agreed that Article 37 and Article 38 of said agreement are, effective May 1, 1945, amended to read and provide as follows:-

Article 37.—Contract Price.

Coal Company hereby agrees to pay to Contractor as full compensation for the full performance of all work and for the furnishing of all material, labor, power, tools, machinery, implements and equipment required for the work described by the Contract Documents and by any detailed drawings and specifications which may be hereafter prepared or which work and materials are, in case of dispute, found to be so required; also, for all loss or expense incurred for delays caused by damage to the work or materials or otherwise; also, for all loss, damage or expense arising in the progress of the work from unforeseen obstructions or difficulties or other risks connected therewith, the [fol. 155] price of one dollar and eighty-five cents ($1.85) per gross ton as determined by scale weight in trucks of Contractor at Coal Company's Westwood Colliery for each and every ton of raw coal delivered into the raw coal chute at Westwood Breaker, under the conditions provided in the Contract Documents.

Article 38.—Stripping Work Wage Scale.

It is hereby agreed that the contract price under this contract is based on the wage scale as provided in the wage agreements between the United Mine Workers of America and the Anthracite Operators of November 17, 1917 and subsequent agreements of November 15, 1918, September 2, 1920, September 19, 1923, February 17, 1926, August 8, 1930, May 7, 1936, May 26, 1939, May 20, 1941, January 9, 1943, March 8, 1944, and May 19, 1945; and/or special or local wage

agreements between the United Mine Workers of America and the Stripping Contractors in District 9, covering shovel operators, dated June 11, 1940 and July 15, 1944, for this class of work in the Anthracite region.

In the event of an increase or decrease in the labor costs of CONTRACTOR by reason of an increase or decrease of the labor wage scale, and/or a resumption of a five day work week instead of a six day work week, the contract price to be paid CONTRACTOR hereunder shall be increased or decreased in an amount equal to such increased or decreased labor cost to CONTRACTOR.

CONTRACTOR hereby agrees to keep at all times adequate books of account and cost records, including records of all wages paid to labor, to immediately post said books upon request of COAL COMPANY so to do, and to permit COAL COMPANY at all reasonable times to examine and take extracts from said records for the purpose of determining the amount of any increase or decrease in CONTRACTOR's labor costs by reason of any such change in the labor wage scale.

In case the books of account and cost records kept by CONTRACTOR are insufficient or in improper form to permit COAL COMPANY to ascertain the amount of any increase or decrease in CONTRACTOR's labor costs by reason of change in the labor wage scale, then and in that event COAL COMPANY shall specify what increase or decrease shall be made in the contract prices as compensation for any such increase or decrease in the labor wage scale and CONTRACTOR shall accept same.

It is further agreed that, with the exception of the amendments of Article 37 and Article 38 of said Agreement dated May 27, 1944, each and every covenant, condition, stipula- [fol. 156] tion and requirement, embodied and contained in the said Agreement dated May 27, 1944 covering the so-called Stripping No. P-22, shall remain in full force and effect as though these presents had not been executed.

In Witness Whereof, the parties of the first part have hereunto set their hands and seals and the party of the second part has hereunto affixed its corporate seal duly attested the day and year first above written.

Witness:

/s/ Joseph Chamberlain /s/ George W. Huss (Seal)
George W. Huss

/s/ Joseph Chamberlain /s/ Russell N. Huss (Seal)
Russell N. Huss

/s/ Joseph Chamberlain /s/ Wesley W. Huss (Seal)
Wesley W. Huss

Partners, Trading and Doing Business as George W. Huss

Contracting Company, a Partnership.

Contractor.

The Philadelphia and Reading Coal and Iron Company (Seal)

By /s/ R. E. Taggart
President

Attest: /s/ M. P. McDermott
Secretary

Coal Company.

[fol. 157] Cancellation of Agreement

In consideration of the sum of one dollar ($1.00), to each in hand paid, and other good and valuable considerations, the receipt of which is hereby acknowledged, it is hereby mutually agreed that the Agreement dated May 27, 1944 between the parties hereto for Stripping and Mining the Various Veins on the North and South Dips at the Tower City Section in Areas designated by the Coal Company Engineer—Stripping No. P-22, and Supplemental Agreements dated August 20, 1945 and October 28, 1946,

be cancelled and annulled, and that all and singular the rights and obligations secured and imposed thereby be terminated as of July 31, 1947.

In Witness Whereof, and intending to be legally bound, the parties to this ag eement have hereunto set their hands and seals this 31st day of October, 1947.

Witness:

/s/ Weller Hunsinger — /s/ George W. Huss (Seal)
George W. Huss

/s/ Weller Hunsinger — /s/ Russell N. Huss (Seal)
Russell N. Huss

/s/ Weller Hunsinger — /s/ Wesley W. Huss (Seal)

Partners, Trading and Doing Business as George W. Huss Contracting Company, a Partnership.

Contractor.

The Philadelphia and Reading Coal and Iron Company (Seal)

By /s/ R. E. Taggart
President

Attest: /s/ Howard Price
Secretary

Coal Company.

[fol. 158] Supplemental Agreement No. 2

Witness This Supplemental Agreement No. 2 made this 28th day of October in the year 1946 between George W. Huss, Russell N. Huss and Wesley W. Huss, trading and doing business as George W. Huss Contracting Company, a Partnership, operating in the Commonwealth of Pennsylvania (hereinafter referred to as "Contractor"), party of the first part, and The Philadelphia and Read-

ING COAL AND IRON COMPANY, a Corporation of the Commonwealth of Pennsylvania (hereinafter referred to as "COAL COMPANY"), party of the second part,

WHEREAS, under date of May 27, 1944, COAL COMPANY and CONTRACTOR executed an Agreement covering the so-called Stripping No. P-22, and

WHEREAS, under date of August 20, 1945, COAL COMPANY and CONTRACTOR executed a Supplemental Agreement amending Article 37 and Article 38 of said Agreement dated May 27, 1944 to provide as follows:

ARTICLE 37.—CONTRACT PRICE.

"COAL COMPANY hereby agrees to pay to CONTRACTOR as full compensation for the full performance of all work and for the furnishing of all material, labor, power, tools, machinery, implements and equipment required for the work described by the Contract Documents and by any detailed drawings and specifications which may be hereafter prepared or which work and materials are, in case of dispute, found to be so required; also, for all loss or expense incurred for delays caused by damage to the work or materials or otherwise; also for all loss, damage or expense arising in the progress of the work from unforeseen obstructions or difficulties or other risks connected therewith, the price of one dollar and eighty-five cents ($1.85) per gross ton as determined by scale weight in trucks of CONTRACTOR at COAL COMPANY'S Westwood Colliery for each and every ton of raw coal delivered into the raw coal chute at Westwood Breaker, under the conditions provided in the Contract Documents."

ARTICLE 38.—STRIPPING WORK WAGE SCALE.

"It is hereby agreed that the contract price under this contract is based on the wage scale as provided in the wage agreements between the United Mine Workers of America and the Anthracite Operators of No-

vember 17, 1917, and subsequent agreements of November 15, 1918, September 2, 1920, September 19, 1923, February 17, 1926, August 8, 1930, May 7, 1936, May 26, 1939, May 20, 1941, January 9, 1943, March 8, 1944, and May 19, 1945; and/or special or local wage agreements between the United Mine Workers of America and the Stripping Contractors in District 9, covering shovel operators, dated June 11, 1940 and July 15, 1944, [fol. 159] for this class of work in the Anthracite region.

"In the event of an increase or decrease in the labor costs of CONTRACTOR by reason of an increase or decrease of the labor wage scale, and/or a resumption of a five day work week instead of a six day work week, the contract price to be paid CONTRACTOR hereunder shall be increased or decreased in an amount equal to such increased or decreased labor cost to CONTRACTOR.

"CONTRACTOR hereby agrees to keep at all times adequate books of account and cost records, including records of all wages paid to labor, to immediately post said books upon request of COAL COMPANY so to do, and to permit COAL COMPANY at all reasonable times to examine and take extracts from said records for the purpose of determining the amount of any increase or decrease in CONTRACTOR'S labor costs by reason of any such change in the labor wage scale.

"In case the books of account and cost records kept by CONTRACTOR are insufficient or in improper form to permit COAL COMPANY to ascertain the amount of any increase or decrease in CONTRACTOR'S labor costs by reason of change in the labor wage scale, then and in that event COAL COMPANY shall specify what increase or decrease shall be made in the contract prices as compensation for any such increase or decrease in the labor wage scale and CONTRACTOR shall accept same."

AND WHEREAS, due to the Wage Agreement of June 7, 1946, between the United Mine Workers of America and

the Anthracite Operators, it is desired to amend said Article 37 and Article 38 of said Supplemental Agreement dated August 20, 1945,

Now, Therefore, it is mutually agreed that Article 37 and Article 38 of said Supplemental Agreement dated August 20, 1945, are, effective June 1, 1946, further amended to read and provide as follows:—

Article 37.—Contract Price.

Coal Company hereby agrees to pay to Contractor as full compensation for the full performance of all work and for the furnishing of all material, labor, power, tools, machinery, implements and equipment required for the work described by the Contract Documents and by any detailed drawings and specifications which may be hereafter prepared or which work and materials are, in case of dispute, found to be so required; also, for all loss or expense incurred for delays caused by damage to the work or materials or otherwise; also, for all loss, damage or expense arising in the progress of the work from unforeseen obstructions or difficulties or other risks connected [fol. 160] therewith, the price of two dollars ($2.00) per gross ton as determined by scale weight in trucks of Contractor at Coal Company's Westwood Colliery for each and every ton of raw coal delivered into the raw coal chute at Westwood Breaker, under the conditions provided in the Contract Documents.

Article 38.—Stripping Work Wage Scale

It is hereby agreed that the contract price under this contract is based on the wage scale as provided in the wage agreements between the United Mine Workers of America and the Anthracite Operators of November 17, 1917 and subsequent agreements of November 15, 1918, September 2, 1920, September 19, 1923, February 17, 1926, August 8, 1930, May 7, 1936, May 26, 1939, May 20, 1941, March 8, 1944, May 19, 1945, and June 7, 1946; and/or special or local wage agreements between

the United Mine Workers of America and the Stripping contractors in District 9, covering shovel operators, dated June 11, 1940 and July 15, 1944, for this class of work in the Anthracite region.

In the event of an increase or decrease in the labor costs of CONTRACTOR by reason of an increase or decrease of the labor wage scale, and/or a resumption of a five-day work week instead of a six-day work week, the contract price to be paid CONTRACTOR hereunder shall be increased or decreased in an amount equal to such increased or decreased labor cost to CONTRACTOR.

CONTRACTOR hereby agrees to keep at all times adequate books of account and cost records, including records of all wages paid to labor, to immediately post said books upon request of COAL COMPANY so to do, and to permit COAL COMPANY at all reasonable times to examine and take extracts from said records for the purpose of determining the amount of any increase or decrease in CONTRACTOR'S labor costs by reason of any such change in the labor wage scale.

In case the books of account and cost records kept by CONTRACTOR are insufficient or in improper form to permit COAL COMPANY to ascertain the amount of any increase or decrease in CONTRACTOR'S labor costs by reason of change in the labor wage scale, then and in that event COAL COMPANY shall specify what increase or decrease shall be made in the contract prices as compensation for any such increase or decrease in the labor wage scale and CONTRACTOR shall accept same.

It is further agreed that, with the exception of the further amendments of Article 37 and Article 38 of said Agreement dated May 27, 1944, each and every covenant, condition, stipulation and requirement, embodied and contained in the said Agreement dated May 27, 1944, covering the so-called Stripping No. P-22, shall remain in full force and effect as though these presents had not been executed.

[fol. 161] IN WITNESS WHEREOF, the parties of the first part have hereunto set their hands and seals and the party

of the second part has hereunto affixed its corporate seal duly attested the day and year first above written.

WITNESS:

/s/ JOSEPH CHAMBERLAIN /s/ GEORGE W. HUSS (Seal)
George W. Huss

/s/ JOSEPH CHAMBERLAIN /s/ RUSSELL N. HUSS (Seal)
Russell N. Huss

/s/ JOSEPH CHAMBERLAIN /s/ WESLEY W. HUSS (Seal)
Wesley W. Huss

Trading and Doing Business as
GEORGE W. HUSS CONTRACTING
COMPANY, a Partnership.

CONTRACTOR.

THE PHILADELPHIA AND READING
COAL AND IRON COMPANY (Seal)

By /s/ R. E. TAGGART
President

Attest: HOWARD PRICE
Secretary

COAL COMPANY.

[fol. 162]

EXHIBIT A

CONTRACT
SPECIFICATIONS
DRAWINGS
STIPULATION AGAINST LIENS

FOR

STRIPPING AND MINING THE VARIOUS VEINS ON THE NORTH AND SOUTH DIPS AT THE TOWER CITY SECTION IN AREAS DESIGNATED BY COAL COMPANY'S ENGINEER—STRIPPING NO. P-22B.

THE PHILADELPHIA AND READING COAL AND IRON COMPANY, POTTSVILLE, PENNSYLVANIA.

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[fol. 166]

THE PHILADELPHIA AND READING COAL AND IRON COMPANY

Pottsville, Pennsylvania

Contract

for

Stripping and Mining the Various Veins on the North and South Dips at the Tower City Section in Areas Designated by the Coal Company's Engineer-Stripping No. P-22B

This memorandum of agreement, made and entered into this 23rd day of February in the year 1945, between George W. Huss, Russell N. Huss and Wesley W. Huss, Partners, trading and doing business as George W. Huss Contracting Company, a Partnership operating in the Commonwealth of Pennsylvania (hereinafter referred to as "Contractor"), party of the first part, and The Philadelphia and Reading Coal and Iron Company, a corporation of the Commonwealth of Pennsylvania (hereinafter referred to as "Coal Company"), party of the second part,

Witnesseth: That for and in consideration of the mutual agreements herein contained, it is agreed by and between the parties hereto, for themselves, their successors, heirs, executors, administrators and assigns as follows:—

PART ONE.—GENERAL

Article 1.—Description of Project.

It is the understanding of the parties hereto that this project is a "salvage stripping" operation. Contractor agrees to assume all risk connected with the prospecting, discovery and recovery of all the coal that is recoverable by stripping in the areas designated by the Coal Company's Engineer.

Contractor does also hereby covenant, promise and agree, for the consideration hereinafter named, to do all

work and provide all the material, labor, tools, equipment, water, light, power, transportation and other facilities, unless specified otherwise hereinafter, required for the excavation, removal and disposal of all overburden material and divider slate lying over, between and/or in the veins of coal and for mining, transporting, and delivery into the raw coal chute at Westwood Breaker of all the raw coal that is recoverable by stripping within the areas designated by COAL COMPANY'S ENGINEER and within the limits set forth by said COAL COMPANY'S ENGINEER, all the above to be done in accordance with the Contract Documents referred to herein and hereto attached, and under the direction and to the satisfaction of COAL COMPANY'S ENGINEER.

[fol. 167] ARTICLE 2.—LOCATION AND LIMITS OF PROJECT.

It is the understanding of the parties hereto that the project referred to above is the stripping areas in the various veins on the North and South Dips at the Tower City Section, as designated by the COAL COMPANY'S ENGINEER, and located on the Swatara Coal Company Lands and Munson and Williams Lands, Porter Township, Schuylkill County, Pennsylvania, which lands are owned by COAL COMPANY.

It is further understood by the parties hereto that the minimum acceptable stripping ratio shall be an average for the entire project of four (4.0) place cubic yards of overburden per gross ton of raw coal recovered.

PART TWO.—PRELIMINARY CONSIDERATIONS.

ARTICLE 3.—CONTRACTOR'S FAMILIARITY WITH PROJECT.

It is the understanding of the parties hereto that CONTRACTOR has carefully examined all data available concerning the stripping area, has visited the site, has fully informed himself as to all existing conditions and limitations including all laws, ordinances and regulations affecting the contract or the work and has included in the bid price a sum sufficient to cover the cost of all items implied or

required to attain the completed conditions contemplated by the contract.

It is further understood that CONTRACTOR has familiarized himself with the features and details of the project insofar as they may tie in with his work.

Failure to have complied with the above shall not relieve CONTRACTOR of any of the obligations of the contract.

ARTICLE 4.—CONTRACT DOCUMENTS.

The Contract Documents consist of the following parts and each is as fully a part of this contract as if herein inserted at length:

CONTRACT.
SPECIFICATIONS.
DRAWINGS.
STIPULATION AGAINST LIENS.

These documents are together the documents governing in the execution of this contract and are hereinafter referred to collectively as the "Contract Documents".

The Contract Documents shall be signed in triplicate by COAL COMPANY and CONTRACTOR. In case of failure to sign the Specifications, COAL COMPANY shall identify them.

[fol. 168] ARTICLE 5.—DEFINITION OF TERMS.

The term "raw coal" as used herein shall mean the mixture of coal, divider slate and extraneous refuse as it is taken from the stripping.

The term "salvage stripping" as used herein shall be deemed to mean a project wherein COAL COMPANY reserves a coal-bearing area for CONTRACTOR, gives CONTRACTOR permission to enter upon this area and strip it, and agrees to pay CONTRACTOR a specified amount of money for each ton of raw coal that CONTRACTOR delivers to COAL COMPANY at a point and under certain conditions specified by COAL COMPANY. In a "salvage stripping" project COAL COMPANY assumes no responsibility for the discovery of coal, gives CONTRACTOR no guarantee of the quantity of coal in the

stripping area and places upon CONTRACTOR all risk in connection with the prospecting, discovery and recovery of coal and the operation of the entire stripping project.

The term "raw coal chute" at Westwood Breaker as used herein shall mean the structure located at Westwood Colliery and is of a suitable design to permit the dumping of the raw coal as contained in the trucks of CONTRACTOR.

"COAL COMPANY'S ENGINEER" referred to in the Contract Documents is the Division Engineer (or his authorized representative) of COAL COMPANY'S Operating Division of which the stripping and mining project covered herein is a part.

The term "subcontractor", as employed in the Contract Documents, includes only those having a direct contract with CONTRACTOR.

"Written Notice" shall be deemed to have been duly served if delivered in person to CONTRACTOR, or to a member of the firm, or to an officer of the corporation for whom it is intended, or if delivered or sent by registered mail, to the addressee at the last business address known to him who gives the notice.

The term "Cubic Yard" as employed in the Contract Documents with reference to overburden is the volume of the overburden material as it exists in place before the start of the proposed work.

The term "Drawings" as employed in the Contract Documents shall be deemed to include all plans, sections, maps, blue prints, photostats, sketches and other similar documents, whether general or detail.

The term "Ton" as employed in the Contract Documents, shall be deemed to mean a gross ton of 2240 pounds.

The term "Overburden" as employed in the Contract Documents, shall be deemed to mean all materials, other than "Divider Slate" and acceptable coal, which it is necessary to excavate, handle, remove and/or dispose of in the course of the work covered by this Contract.

[fol. 169] The term "Extraneous Refuse" as employed in the Contract Documents, shall be deemed to mean material originating outside of the vein or veins or within the vein or veins in the form of major partings which are of such

nature and thickness as can, in the opinion of COAL COMPANY'S ENGINEER, be removed separately from the coal by power shovel.

The term "Divider Slate" as employed in the Contract Documents, shall be deemed to mean any slate, rock or other material (other than acceptable coal) which may be found to exist within the limit of the coal vein or veins included within this stripping and mining operation.

All time limits stated in the Contract Documents are of the essence of the contract.

Article, Section and Paragraph headings and titles are for convenience of reference only, and shall not be construed to affect in any manner the scope or meaning of any article, section or paragraph of this contract.

Throughout the Contract Documents, COAL COMPANY is referred to as neuter gender and singular number and CONTRACTOR as masculine gender and singular number.

ARTICLE 6.—CONTRACT, SPECIFICATIONS AND DRAWINGS.

CONTRACTOR agrees that the drawings referred to in the Specifications shall be deemed a part of the Contract and that this Contract, the Specifications and Drawings, are to be considered together in the execution of the Contract.

ARTICLE 7.—SUFFICIENCY OF SPECIFICATIONS.

CONTRACTOR admits that the Specifications are sufficient for their intended purpose; the purpose of the Specifications being to describe the stripping areas and set forth other conditions that CONTRACTOR must fulfill on the project; CONTRACTOR further covenants and agrees to be governed in each case by detail specifications which are to be deemed a part of the Specifications referred to herein and made a part hereof, although said detail Specifications may not be prepared until after the commencement of said work.

ARTICLE 8.—DIRECTION OF WORK PERFORMED.

CONTRACTOR agrees to perform all work hereunder in accordance with directions that may from time to time be given to CONTRACTOR by COAL COMPANY'S ENGINEER.

[fol. 170] PART THREE.—OBLIGATIONS OF CONTRACTOR

Work To Be Done

ARTICLE 9.—WORK TO BE DONE BY CONTRACTOR.

CONTRACTOR agrees to perform all work required for the prospecting, discovery and recovery of all coal; the removal of overburden; and for the delivery of raw coal into the Raw Coal Chute at Westwood Breaker located at Westwood Colliery and owned by COAL COMPANY; all the above to be done to the extent and under conditions described in the Contract Documents.

ARTICLE 10.—ITEMS TO BE PROVIDED BY CONTRACTOR.

Unless otherwise stipulated, CONTRACTOR agrees to provide and pay for all materials, labor, tools, equipment, water, light, power, transportation and other facilities necessary for the execution and completion of the work. Materials or work described in words which so applied have a well-known technical or trade meaning shall be held to refer to such recognized standards.

ARTICLE 11.—DETERMINATION OF SCOPE OF WORK.

The term "Scope of Work" as used herein is understood by the parties hereto to refer to everything required to extract, process and deliver into the raw coal chute at Westwood Breaker, all of the raw coal that is recoverable by stripping within the areas of the project described in Articles 1 and 2.

It is the understanding of the parties hereto that the Scope of Work will be determined and controlled by the actual conditions found to prevail with respect to the project and that these conditions must be ascertained by prospecting and proving to be done by the CONTRACTOR at his expense and under the direction of the COAL COMPANY'S ENGINEER.

ARTICLE 12.—CLAIMS FOR EXTRA COMPENSATION.

COAL COMPANY agrees that COAL COMPANY'S ENGINEER, in giving directions to CONTRACTOR, shall have authority to make minor changes in the work (excepting changes in the minimum stripping ratio hereinbefore described), not involving extra cost to COAL COMPANY, and not inconsistent with the general purpose of the work, but the parties hereto mutually covenant and agree that no other changes in the work shall be made unless pursuant to a written order from COAL COMPANY authorizing the change, and stating the lump sum or unit prices to be paid for the same, and CONTRACTOR agrees that he will not make any claim for extra compensation based on any changes not so authorized in writing by COAL COMPANY.

[fol. 171] ARTICLE 13.—AMENDMENTS TO THIS CONTRACT.

No amendment to this contract shall be valid unless the same is made by an instrument in writing executed by COAL COMPANY and by CONTRACTOR, and in case of such amendment, so much of this contract as is not necessarily thereby changed shall remain in force; and no act or conduct of either party shall be held to operate as a waiver of any provision of this contract, unless in writing duly executed by the party against which it is asserted.

Method To Be Used

ARTICLE 14.—PROCEDURE.

CONTRACTOR agrees to prosecute the work in a diligent, workmanlike manner, to the satisfaction of COAL COMPANY'S ENGINEER, and in accordance with the procedure and instructions set forth in the Contract Documents.

ARTICLE 15.—REMOVAL AND DISPOSAL OF OVERBURDEN.

CONTRACTOR agrees to remove and dispose of overburden and divider slate as provided in the Specifications.

ARTICLE 16.—CLEANING OPENINGS IN COAL.

CONTRACTOR agrees to clean thoroughly all existing openings in coal and to keep the same free from all materials (other than coal) that may be precipitated into the workings within the limits of the stripping and mining project, all this to be done to the satisfaction of COAL COMPANY'S ENGINEER.

ARTICLE 17.—DEPOSITING COAL CUT.

CONTRACTOR agrees to pick out carefully, at his own expense, any coal which may be cut during the progress of the removal of overburden and divider slate and to deposit it at such points in the workings as may be designated by COAL COMPANY'S ENGINEER, this coal to be subsequently recovered during mining operations.

ARTICLE 18.—REMOVAL AND LOADING OUT OF COAL.

CONTRACTOR agrees to remove and load out the coal as directed by COAL COMPANY'S ENGINEER and in the manner described in the Specifications.

Equipment To Be Used

ARTICLE 19.—SCHEDULE OF EQUIPMENT.

CONTRACTOR agrees to have at least the following equipment on the job, with competent and sufficient foremen, [fol. 172] operators, and laborers to operate same, and at work within the time specified after each item:

NAME, TYPE AND SIZE OF EQUIPMENT;	EQUIPMENT WILL BE AT WORK ON THE JOB WITHIN NUMBER OF DAYS INDICATED SUBSEQUENT TO DATE OF THIS CONTRACT
Power Shovels, Drills, Trucks and Miscellaneous Equipment	
Sufficient power shovels, well drills, trucks, tractors, pumps and other miscellaneous equipment to properly execute the work on this project	When required.

When Work Is To Be Done

ARTICLE 20.—START OF OPERATIONS.

CONTRACTOR agrees to enter upon the performance of said work within thirty (30) days after date of this Contract and to proceed with it continuously carrying it on at such points and in such order and at such times as he may from time to time be directed by COAL COMPANY'S ENGINEER and in no case to proceed without first obtaining from COAL COMPANY'S ENGINEER complete directions for the proper execution of work.

ARTICLE 21.—RATE OF REMOVAL OF OVERBURDEN.

CONTRACTOR agrees, unless delayed by fires, strikes, floods or other unavoidable casualties, or by the written instructions of COAL COMPANY, to remove the overburden and divider slate at such a rate that the coal production requirements as set forth in Article 22 shall at all times be attainable.

ARTICLE 22.—SCHEDULE OF COAL EXTRACTION.

CONTRACTOR agrees, unless delayed by fires, strikes, floods or other unavoidable casualties, or by the written instructions of COAL COMPANY, to produce, and to maintain the stripping and mining operations in condition to produce the maximum number of gross tons of raw coal obtainable per single seven (7) hour shift, beginning at a reasonable time after the date of this contract and continuing thereafter to completion of the project.

After completing the removal of coal by dipper shovel, CONTRACTOR shall install drag shovel equipment to recover, to the satisfaction of COAL COMPANY'S ENGINEER, whatever coal that cannot be recovered by dipper shovel.

[fol. 173] ARTICLE 23.—SUSPENSION OF WORK.

(a) CONTRACTOR covenants and agrees that COAL COMPANY shall have the right to entirely cancel and terminate this contract, without specifying any reason therefore, upon thirty (30) days' notice in writing to CONTRACTOR of COAL COMPANY'S intention so to do, and in that event COAL

COMPANY shall not be liable to CONTRACTOR for any loss of anticipated profits or any other damages whatsoever.

(b) CONTRACTOR further covenants and agrees that COAL COMPANY shall have the right to temporarily suspend work under this contract at any time or times by giving CONTRACTOR written notice of COAL COMPANY'S intention so to do. Should any such temporary suspension be made and continue for a period of five (5) weeks, except in case of strike or lockout, CONTRACTOR may notify COAL COMPANY in writing of CONTRACTOR'S desire to cancel this contract and, if within thirty (30) days after receipt of said notice COAL COMPANY fails to give CONTRACTOR a written order to resume work, then CONTRACTOR may thereupon, by written notice served upon COAL COMPANY, forthwith cancel and terminate this contract. In the event of any such cancellation by CONTRACTOR, COAL COMPANY shall not be liable to CONTRACTOR for any loss of anticipated profits or other damages whatsoever. If no such notice to cancel this contract has been given by CONTRACTOR and COAL COMPANY desires at any time a resumption of the work under this contract, it shall so notify CONTRACTOR, and upon receipt of such notice CONTRACTOR agrees that he will, within five (5) days thereafter, resume operation.

ARTICLE 24.—INTERRUPTION OF WORK.

It is the understanding of both parties that COAL COMPANY shall in no wise be held liable to CONTRACTOR for any interruptions or hindrance to the regular and continuous prosecution of the work to be performed by CONTRACTOR under the terms of this contract that may be caused by strikes of the workmen of COAL COMPANY, or through the interference of such workmen of COAL COMPANY with the workmen of CONTRACTOR, or that may be caused by any other occurrences beyond the control of COAL COMPANY.

Other Obligations of CONTRACTOR.

ARTICLE 25.—TAXES, OLD AGE BENEFITS, WORKMEN'S COMPENSATION, UNEMPLOYMENT INSURANCE AND PUBLIC LIABILITY INSURANCE.

CONTRACTOR agrees that he and each of his subcontractors will deduct from the wages of his, its, or their employees

and pay over to the proper authorities any tax or taxes as required by any State or Federal Laws and will comply with all State and Federal Laws relating to Old Age Benefits, Workmen's Compensation and Unemployment Insurance, including provision for the payment of Workmen's Compensation benefits to his employees or their dependents in accordance with the laws of the Commonwealth of Pennsylvania and all amendments thereto.

[fol. 174] CONTRACTOR also agrees that he and each of his subcontractors shall carry a Public Liability Policy, with limits of at least $25,000 for any one person and $50,000 for any one accident. Before any of the employees of CONTRACTOR or employees of his subcontractors shall do any work upon the premises of COAL COMPANY, CONTRACTOR agrees to furnish COAL COMPANY with a certificate that such insurance coverage has been provided; said certificate to contain the date when the coverage expires. CONTRACTOR agrees that the coverage shall not be cancelled until after all work required by this Contract is completed.

ARTICLE 26.—SURETY BOND.

If COAL COMPANY so requests, CONTRACTOR agrees to deliver to said COAL COMPANY, before the expiration of fifteen (15) days from the date of such request and, before any further payment hereunder shall become due from COAL COMPANY, a bond for the faithful performance of this Contract by CONTRACTOR in a form and in a penal sum satisfactory to COAL COMPANY executed by CONTRACTOR as principal and by a surety company satisfactory to COAL COMPANY as surety, the cost of said bond to be paid by COAL COMPANY.

ARTICLE 27.—PERMITS FROM PUBLIC AUTHORITIES.

CONTRACTOR agrees to obtain and pay for all permits from public authorities which may be required in connection with the performance of this contract, and to comply with all municipal and other public laws, ordinances, and requirements in regard to the same, and with all rules and regulations of any insurance companies which may have issued policies upon any part of the work or who may be asked

to do so. CONTRACTOR also agrees to comply with the lawful orders of any public authority made from time to time in respect to the work to be done hereunder.

ARTICLE 28.—EMPLOYEES

CONTRACTOR agrees to employ competent workmen and foremen, and immediately to discharge, whenever ordered to do so by COAL COMPANY, any person considered by COAL COMPANY incompetent, or disposed to be disorderly, and further agrees not again to employ such person upon the work.

ARTICLE 29.—WATCHMEN.

It is the understanding of the parties hereto that COAL COMPANY shall not be responsible for the loss of or damage to the property of CONTRACTOR and/or his subcontractors (if any) from any cause. CONTRACTOR shall furnish whatever watchmen he finds necessary adequately to protect his interests.

ARTICLE 30.—PRECAUTIONS TO BE TAKEN BY CONTRACTOR.

CONTRACTOR agrees to use due care throughout the work, and that whenever the Specifications for any part of the work are, in his opinion, faulty, or at variance with any [fol. 175] rules or ordinances applying to the work, or are such as will, if followed, result in unsafe conditions or will cause the work to result in pecuniary loss to COAL COMPANY or in any damage or loss to persons or property, he will instantly stop work on the portion affected thereby and immediately notify COAL COMPANY in writing of such opinion, and in what respect he considers said Specifications are faulty or at variance as aforesaid and CONTRACTOR will not proceed with the part of the work so affected until he has received a written order from COAL COMPANY'S ENGINEER directing what is to be done and when to proceed.

ARTICLE 31.—PROTECTION OF COAL COMPANY.

CONTRACTOR further covenants and agrees that he will indemnify and save harmless COAL COMPANY, its successors

and assigns, of and from any loss, damage, cost, charge or expense, whether direct or indirect and whether to persons or property, to which COAL COMPANY, or its successors or assigns, may be subjected by any act, action, neglect or default on the part of CONTRACTOR or his subcontractors or any of CONTRACTOR's or sub-contractors' officers, agents or employees.

If at any time during the progress of the work, CONTRACTOR shall allow any indebtedness to become due for labor, materials or services, whether said indebtedness may or may not become a lien or liens upon property of COAL COMPANY, or whether said indebtedness may or may not become a claim against COAL COMPANY, and shall permit said indebtedness to remain unpaid for a period of fifteen (15) days, CONTRACTOR shall immediately upon request from COAL COMPANY, pay the same, or cause the same to be secured by giving a bond, or otherwise, and in case of his failure so to do, COAL COMPANY, at its option, may withhold any money due CONTRACTOR until such indebtedness is paid or may apply such money towards the discharge thereof, or may forthwith terminate the employment of CONTRACTOR and proceed in accordance with the provisions of Article 47 hereof.

ARTICLE 32.—LIABILITY FOR DAMAGE TO OTHER CONTRACTORS.

If CONTRACTOR should cause damage to any other contractor on the stripping and mining operations, he agrees upon due notice to settle with such other contractor by agreement or arbitration. If any other contractor claiming damages sues COAL COMPANY on account of any damage alleged to have been sustained, COAL COMPANY shall notify CONTRACTOR who agrees to defend such proceedings at his own expense. If any judgment against COAL COMPANY arises therefrom, CONTRACTOR agrees to pay or satisfy it and pay all costs incurred by COAL COMPANY.

ARTICLE 33.—SUBCONTRACTING AND ASSIGNING.

CONTRACTOR further covenants and agrees that he will not sell, assign, transfer or set over this contract or any part or interest therein to any person or persons whomso-

ever, without the consent in writing of COAL COMPANY, and any such sale, assignment or transfer, without such written [fol. 175a] consent from COAL COMPANY, shall be null and void. Any subcontracts entered into by CONTRACTOR shall be submitted to COAL COMPANY for approval and COAL COMPANY shall have the right to reject any subcontractor whom COAL COMPANY considers incompetent or unable satisfactorily to perform the portion of the work involved, and in that case such subcontractor shall do no work hereunder.

CONTRACTOR agrees to impose on the subcontractors under his charge the same responsibilities which CONTRACTOR assumes by these terms and conditions and the contract in general, and CONTRACTOR agrees that he will be fully responsible to COAL COMPANY for the acts and omissions of his subcontractors and of persons either directly or indirectly employed by all subcontractors.

ARTICLE 34.—LIENS.

No claim or mechanic's lien shall be filed by anyone against the tracts of ground upon which the stripping and mining operations are to be conducted or the buildings, machinery, or other "structure" (as defined by the Pennsylvania Mechanics Lien Act), erected thereon or any part thereof, whether so conducted, erected and constructed strictly in accordance with the provisions of the Contract Documents, or in accordance with any amendments thereof. CONTRACTOR shall execute in a form supplied by and acceptable to COAL COMPANY a separate agreement with COAL COMPANY to this effect so that the same may be duly filed.

ARTICLE 35.—COAL COMPANY'S OCCUPANCY OF PREMISES.

CONTRACTOR agrees that COAL COMPANY may, during the progress of the work, place and install or cause to be placed and installed within the area covered by these stripping and mining operations such other structures, equipment and materials and may carry on such other operations as it may deem desirable for its own purposes, before the completion of the various parts of the work, provided,

however, that such use of portions of said area shall not substantially interfere with the work of CONTRACTOR, and CONTRACTOR further agrees that such placing and installation of structures, equipment and material shall not in any way evidence the completion of the work or any portion of it, nor shall be deemed or construed to signify COAL COMPANY'S acceptance of the work or any part thereof.

ARTICLE 36.—REMOVAL OF CONTRACTOR'S EQUIPMENT.

Upon the completion of the work to the satisfaction of COAL COMPANY, CONTRACTOR agrees to remove from the premises at his own expense all equipment, machinery and structures used by him in the said stripping and mining operations.

[fol. 176] PART FOUR.—OBLIGATIONS OF COAL COMPANY

Prices To Be Paid for the Work.

ARTICLE 37.—CONTRACT PRICE.

COAL COMPANY hereby agrees to pay to CONTRACTOR as full compensation for the full performance of all work and for the furnishing of all material, labor, power, tools, machinery, implements and equipment required for the work described by the Contract Documents and by any detailed drawings and specifications which may be hereafter prepared or which work and materials are, in case of dispute, found to be so required; also, for all loss or expense incurred for delays caused by damage to the work or materials or otherwise; also for all loss, damage or expense arising in the progress of the work from unforeseen obstructions or difficulties or other risks connected therewith, the price of one dollar and eighty-five cents ($1.85) per gross ton as determined by scale weight in trucks of CONTRACTOR at COAL COMPANY'S Westwood Colliery for each and every ton of raw coal delivered into the raw coal chute at Westwood Breaker, under the conditions provided in the Contract Documents.

ARTICLE 38.—STRIPPING WORK WAGE SCALE.

It is hereby agreed that the contract price under this contract is based on the wage scale as provided in the wage agreements between the United Mine Workers of America and the Anthracite Operators of November 17, 1917 and subsequent agreements of November 15, 1918, September 2, 1920, September 19, 1923, February 17, 1926, August 8, 1930, May 7, 1936, May 26, 1939, May 20, 1941, January 9, 1943 and March 8, 1944; and/or special or local wage agreements between the United Mine Workers of America and the Stripping Contractors in District 9, covering shovel operators, dated June 11, 1940 and July 15, 1944, for this class of work in the Anthracite region.

In the event of an increase or decrease in the labor costs of CONTRACTOR by reason of an increase or decrease of the labor wage scale, and/or a resumption of a five day work week instead of a six day work week, the contract price to be paid to CONTRACTOR hereunder shall be increased or decreased in an amount equal to such increased or decreased labor cost to CONTRACTOR.

CONTRACTOR hereby agrees to keep at all times adequate books of account and cost records, including records of all wages paid to labor, to immediately post said books upon request of COAL COMPANY so to do, and to permit COAL COMPANY at all reasonable times to examine and take extracts from said records for the purpose of determining the amount of any increase or decrease in CONTRACTOR's labor costs by reason of any such change in the labor wage scale.

In case the books of account and cost records kept by CONTRACTOR are insufficient or in improper form to permit COAL COMPANY to ascertain the amount of any increase or decrease in CONTRACTOR's labor costs by reason of change in the labor wage scale, than and in that event COAL COMPANY shall specify what increase or decrease shall be made [fol. 177] in the contract prices as compensation for any such increase or decrease in the labor wage scale and CONTRACTOR shall accept same.

Terms of Payment

ARTICLE 39.—TIME AND METHOD OF PAYMENT.

The time and method of payment will be as follows:

CONTRACTOR will be paid on the regular stripping semi-monthly pay day schedule for each and every ton of raw coal that passes over the raw coal scale at COAL COMPANY's Westwood Colliery during the period covered by the pay day schedule.

No additional retainer will be required on this contract, but it is the understanding of both parties that the amount of $2500 which is held by the COAL COMPANY as retainer until the completion of the P-22 Stripping Contract, will be carried over to this contract, which sum will be held by COAL COMPANY until completion of this contract as a guarantee for the faithful performance by CONTRACTOR of this contract.

Other Obligations of COAL COMPANY

ARTICLE 40.—

Blank.

ARTICLE 41.—

Blank.

ARTICLE 42.—

Blank.

ARTICLE 43.—

Blank.

ARTICLE 44.—PROVIDE DRAWINGS.

COAL COMPANY agrees to furnish to CONTRACTOR, free of charge, all copies of Drawings and Specifications reasonably necessary for the execution of the work.

It is the understanding of both parties that all drawings, specifications and copies thereof furnished by COAL COMPANY shall remain the property of COAL COMPANY. No part or all of these shall be used by CONTRACTOR on other work

and, with the exception of the specifications attached to CONTRACTOR's original copy of this Contract, they shall be returned to COAL COMPANY upon request upon termination of his work under this Contract.

[fol. 178] ARTICLE 45.—SURVEYS, LINES AND GRADES.

COAL COMPANY'S ENGINEER will furnish surveys establishing with sufficient definiteness grade lines for the construction of all transportation and/or other facilities by CONTRACTOR.

ARTICLE 46.—TEMPORARY BUILDINGS.

COAL COMPANY agrees to permit CONTRACTOR to erect at his own expense at such points and places as COAL COMPANY'S ENGINEER shall designate for the purpose, such buildings as may be necessary to carry on the work under this agreement, which buildings are to be removed by CONTRACTOR upon termination of his work done under this Contract. If CONTRACTOR fails to so remove said buildings, COAL COMPANY may do so at CONTRACTOR'S expense and CONTRACTOR agrees to immediately pay the same upon receipt of a bill therefore from COAL COMPANY, or COAL COMPANY may deduct such amount from sums then due and owing the CONTRACTOR by COAL COMPANY.

PART FIVE.—GENERAL PROVISIONS.

ARTICLE 47.—FORFEITURE OF CONTRACT.

In the event that CONTRACTOR should at any time refuse or neglect to supply a sufficient number of properly skilled workmen, plant, equipment or materials of the proper quantity or quality or fail in any respect to prosecute the work with sufficient promptness and diligence, or fail in the performance of any of the covenants and agreements herein contained, such refusal, neglect or failure being certified by COAL COMPANY'S ENGINEER, COAL COMPANY shall be at liberty, after three days' written notice to CONTRACTOR, to provide any such labor, plant, equipment or materials, and to deduct the cost thereof from any money then due or thereafter to become due to CONTRACTOR under this con-

tract; and if said COAL COMPANY'S ENGINEER shall certify that such refusal, neglect or failure is sufficient ground for such action, COAL COMPANY shall also be at liberty to terminate the employment of CONTRACTOR for the said work and to enter upon the premises and take possession, for the purpose of completing the work included under this contract, of all plant, equipment, materials, tools, and appliances thereon, and to employ any other person or persons to finish the work, and to provide the materials therefore; and in case of such discontinuance of the employment of CONTRACTOR he shall not be entitled to receive any further payment under this contract until the said work shall be wholly finished, at which time, if the unpaid balance of the amount to be paid under this contract shall exceed the expense incurred by COAL COMPANY in finishing the work, such excess shall be paid by COAL COMPANY to CONTRACTOR. But if such expense shall exceed such unpaid balance, CONTRACTOR shall pay the difference to COAL COMPANY. The expense incurred by COAL COMPANY as herein provided, either for furnishing materials or for finishing the work, and any damage incurred through such default, shall be audited and certified by the Treasurer of COAL COMPANY whose certificate thereof shall be conclusive upon the parties unless objected to in writing within ten days from certification and service. In case an objection to the certificate [fol. 179] of the Treasurer shall be filed within the time specified as aforesaid, the accuracy of the said certificate shall be determined by arbitration.

ARTICLE 48.—ARBITRATION.

Whenever under any of the provisions of this Contract it is provided that any question shall be determined by arbitration at the instance of either COAL COMPANY or CONTRACTOR, the question at the time in dispute shall be determined by three arbitrators selected or appointed as hereinafter provided. The party desiring arbitration shall give written notice to the other party setting forth in general terms the question or questions to be arbitrated and determined and the section or sections of this Contract under which the right of arbitration arises, and in said

notice shall appoint an arbitrator. Within ten days thereafter the party so notified shall appoint in writing an arbitrator and shall give written notice of such appointment to the party desiring arbitration; but if within said ten days the said arbitrator is not so appointed and notified to the party desiring arbitration, then the party desiring arbitration may make application to the then President of The Fidelity-Philadelphia Trust Company of Philadelphia for the appointment of such arbitrator; and it is hereby agreed that the said President may appoint such arbitrator. The first arbitrator and the second arbitrator so appointed shall, within ten days after the appointment of the latter, select a third arbitrator, but if they shall fail so to do within said period of ten days, either party may make application to the then President of the Fidelity-Philadelphia Trust Company of Philadelphia for the appointment of a third arbitrator, and it is hereby agreed that the said President may appoint such arbitrator. The decision of a majority of the three arbitrators so appointed and selected shall be final, binding and conclusive upon both parties hereto without any right of appeal therefrom to any Court, except such as is provided for in the Act of Assembly of the Commonwealth of Pennsylvania approved April 25, 1927, P. L. 381. Each party shall bear its own cost and expense of arbitration. The costs and expenses incurred by the arbitrators, including their reasonable compensation, shall be paid in equal shares by COAL COMPANY and CONTRACTOR.

The provisions of the said Act of Assembly of the Commonwealth of Pennsylvania, as the same may be amended and supplemented from time to time, shall be applicable to the arbitration herein provided for.

ARTICLE 49.—PREVIOUS COMMUNICATIONS.

All previous communications between the parties hereto, either verbal or written, are hereby abrogated and withdrawn, and this contract with the Specifications referred to herein constitutes the whole agreement between the parties hereto.

[fol. 180] IN WITNESS WHEREOF, the parties to this agreement have hereunto set their hands and seals as of the day and year first above written.

Signed, sealed and delivered
in the presence of us:

/s/ JOSEPH CHAMBERLAIN /s/ GEORGE W. HUSS (SEAL)
George W. Huss

/s/ JOSEPH CHAMBERLAIN /s/ RUSSELL N. HUSS (SEAL)
Russell N. Huss

/s/ JOSEPH CHAMBERLAIN /s/ WESLEY W. HUSS (SEAL)
Wesley W. Huss

Partners, Trading and Doing Business
as GEORGE W. HUSS CONTRACTING COMPANY,
a Partnership.

CONTRACTOR.

THE PHILADELPHIA AND READING COAL
AND IRON COMPANY (SEAL)

By /s/ R. E. TAGGART
President

Attest: /s/ M. P. MCDERMOTT
Secretary

COAL COMPANY.

[fol. 182]

SPECIFICATIONS

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[fol. 183]

Specifications

for

Stripping and Mining the Various Veins on the North and South Dips at Tower City Section, in Areas Designated by the Coal Company's Engineer—Stripping No. P-22B

The Philadelphia and Reading Coal and Iron Company, Pottsville, Pennsylvania.

I.—GENERAL.

This Specification and Drawings listed hereinunder are a part of the "Contract Documents" which shall apply in full and in part.

II.—DRAWINGS.

The drawings above referred to are the mine maps of the Coal Company that are available for reference in the Coal Company's office.

III.—DESCRIPTION OF PROJECT.

The work covered by this specification includes the performance of all work and the furnishing and paying for all the material, labor, tools, equipment, water, light, power, transportation and other facilities, unless specified otherwise, hereinafter, required for the excavation, removal and disposal of all overburden materials and divider slate lying over, between and/or in the veins of coal and for mining, transporting to and delivery into the raw coal chute at Westwood Breaker of all the raw coal that is recoverable by stripping in the area designated by COAL COMPANY'S ENGINEER and within the limits set forth by said COAL COMPANY'S ENGINEER, all the above to be done in accordance with the Contract Documents referred to herein.

IV.—LOCATION AND LIMITS OF PROJECT.

It is the understanding of the parties hereto that the project referred to above is the stripping areas in the various veins on the North and South Dips at the Tower City Section, as designated by the COAL COMPANY'S ENGINEER and located on the Swatara Coal Company Lands and Munson and Williams Lands, Porter Township, Schuylkill County, Pennsylvania, which lands are owned by COAL COMPANY.

It is further understood by the parties hereto that the minimum acceptable stripping ratio shall be an average for the entire project of four (4.0) place cubic yards of overburden per gross ton of raw coal recovered.

[fol. 184] V.—PROCEDURE.

CONTRACTOR shall conduct stripping and mining operations on the project in a manner which will permit producing coal at the rate and under the conditions described in Article 22 of the Contract.

VI.—OVERBURDEN DISPOSAL.

CONTRACTOR will comply with instructions from COAL COMPANY'S ENGINEER regarding the disposal of overburden

and divider slate. It is distinctly understood and agreed that nothing herein contained shall be considered as implying or controlling the destination or place of dumping of the material carried away under the terms of this contract. The destination of the material carried away is exclusively within the control of the CONTRACTOR.

VII.—REMOVAL OF SURFACE REFUSE.

All surface stone, dirt and clay washed into the stripping pits must be kept out of the coal loaded by CONTRACTOR at his own expense.

VIII.—REFUSE IN RAW COAL.

CONTRACTOR shall so conduct stripping and mining operations as to keep at a minimum "extraneous refuse" loaded with the coal, and he agrees to be controlled in this matter by the instructions of COAL COMPANY'S ENGINEER, and to be bound by his decision.

IX.—POINT OF DELIVERY OF COAL.

CONTRACTOR will deliver and dump the raw coal into the raw coal chute at Westwood Breaker owned by COAL COMPANY and located at Westwood Colliery.

X.—RAW COAL CHUTE AT WESTWOOD BREAKER.

COAL COMPANY agrees to permit CONTRACTOR to enter upon COAL COMPANY'S premises for delivery of raw coal to the raw coal chute at Westwood Breaker.

XI.—OTHER PROVISIONS.

(a) Power

CONTRACTOR shall, at his own expense, provide all power required for operation of the project.

(b) Water

CONTRACTOR shall, at his own expense, provide all water required for operation of the project.

(c) Roads and Track

CONTRACTOR shall, at his own expense, provide all roads, [fol. 185] and/or tracks required for the handling, removal and disposal of overburden and coal, and for delivery of raw coal to the raw coal chute at Westwood Breaker.

(d) Outlet Cuts

CONTRACTOR shall, at his own expense, provide all outlet cuts required for the handling, removal and disposal of overburden and coal, and for delivery of raw coal mined to the raw coal chute at Westwood Breaker.

(e) Railroad Siding

The Reading Railroad spur tracks at Good Spring are at present available to the CONTRACTOR for bringing to the project all equipment and materials required for the completion of the work on the project.

CONTRACTOR shall provide all facilities and labor to unload and store all his own material, apparatus and equipment, and shall be entirely responsible for same.

Less-than-carload shipments shall be handled through the nearest local railroad freight house, and CONTRACTOR shall arrange for the delivery of such shipments to the location of his job.